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TREATISE

ON THE

LAW OF INJUNCTIONS,

AS ADMINISTERED IN THE COURTS

OF

THE UNITED STATES AND ENGLAND.

THE LAW LIBRARY

BY

JAMES L. HIGH,

COUNSELOR AT LAW.

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TO

THE HON. THOMAS DRUMMOND,

CIRCUIT JUDGE

OF THE

UNITED STATES, FOR THE SEVENTH JUDICIAL CIRCUIT,

WHO FOR NEARLY A QUARTER OF A CENTURY HAS

ADORNED THE BENCH AND SHED LUSTRE UPON THE PROFESSION,

THIS WORK IS RESPECTFULLY DEDICATED, BY

THE AUTHOR.

PREFACE.

The jurisdiction of courts of equity by the writ of injunction, though of English origin, is largely the result of American growth and development. Perhaps no branch of equity jurisprudence owes more to the decisions of American courts, and the growing frequency of the use of this writ, of late years, has invested the subject with a new importance. Of the more recent text-books upon the Law of Injunctions, that of Mr. Hilliard, professing to be purely American, contains, of course, but few citations of English cases, while the English treatises of Mr. Kerr and Mr. Joyce, though complete and exhaustive so far as regards the English authorities, contain but few references to the opinions of our courts, and leave the rich field of American decisions almost untouched. And the fact that very many of the English authorities, noticeably those of recent date, are modified by statutes which are inapplicable here, has seemed to the author to create an additional necessity for a work which should be based upon the decisions of both countries, and which should present the general principles governing courts of equity, both in England and America, in the administration of preventive relief.

In the preparation of this work, the cases cited have been carefully and patiently studied, from beginning to end, without regard to the head notes, and the author has constantly endeavored to present the principles underlying the actual decis-

ions of the courts upon the points actually involved in the cases. To analyze and weigh these decisions, and to deduce therefrom the principles underlying them all, is the work which he has attempted. Believing it to be the proper function of legal authorship to state the law as it is, rather than as it ought to be, he has studiously refrained from the obtrusion of his own theories, not merely because they would carry little weight of themselves, but because in these days of multiplied book making, the tendency among lawyers is to use text-books merely as guide-posts, to direct them to the fountain head of our jurisprudence, the reports. But he has written in the firm conviction that the beneficent system of equity, whose "strong right arm" constitutes the subject matter of this work, is destined to outlive the iconoclasm of modern law reformers and codifiers, and to constitute for all time an integral part of our jurisprudence. That his work is without blemishes, he has not dared to hope; but that it will be found to have some merits, he confidently believes, otherwise it would never have been submitted to the verdict of a critical profession.

J. L. H.

CHICAGO, January 1, 1873.

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THE

LAW OF INJUNCTIONS.

CHAPTER I.

DEFINITION, NATURE AND PURPOSE OF THE WRIT.

§ 1. Definition.
2. Mandatory injunctions.
3. Interlocutory and perpetual injunctions.
4. Object of an interlocutory injunction.
5. Interlocutory injunction not decisive as to the merits.
6. Common and special injunctions. Injunctions in courts of the United States are special.
7. Bill should show some primary equity. Complainant must not be guilty of laches.
8. Writ not usually granted where the legal right is in doubt.
9. Positive injury must be made to appear. Injunction will not be granted to encourage litigation.
10. Utmost care necessary in the exercise of the jurisdiction.
11. Right to preliminary injunction not *ex debito justitiæ*, but addressed to the discretion of the court.
12. The prevention of a multiplicity of suits a favorite ground for the exercise of the jurisdiction.
13. Court will balance relative convenience and inconvenience.
14. Injunctions in cases of trusts.
15. Not usually granted to award possession of property, personal or real.
16. Discretion of court as to preliminary injunctions not subject to review; as to final injunctions may be reviewed.
17. Courts of co-ordinate jurisdiction.
18. Naked, legal right will not be protected which complainant has covenanted not to exercise. Injunction in behalf of the public.
19. Right of petition may be enjoined in England, but not in America.
20. Injunction effective from time of notice. Official notice not necessary.

21. A threatened wrong sufficient ground for injunction. Mere insolvency not sufficient.
22. Disclosure of confidential secrets may be enjoined.
23. Equity will not enjoin the commission of crimes, nor will it restrain the violation of penal statutes.
24. Fraud as a ground of the jurisdiction.
25. Fraudulent transfers.
26. Only judgment creditors may restrain fraudulent transfers.
27. Applications of the rule.
28. General averments of fraud insufficient.
29. Applications of the rule.
30. Injunction not allowed where remedy exists at law.
31. Where statutory remedy exists it must be followed.
32. Injunction must be specially prayed. May be granted without bill in certain cases.
33. Where injunction can be had by motion new suit will not be entertained.
34. Injunction will not be granted against persons and property in a foreign state.
35. Positive averment of facts necessary.
36. Allegations upon information and belief insufficient.
37. Verification of the bill.
38. Cases where verification may be dispensed with.
39. Precision required in the writ. No particular form requisite.
40. Injunction sometimes granted though not prayed for in the bill.
41. Injunction may be reinstated after dissolution.
42. After dissolution new injunction not allowed on the same equities.
43. New injunction not granted *ex parte* after dissolution.

§ 1. A writ of injunction may be defined as a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or to refrain from doing a particular thing.[1] In its broadest sense the process is restorative as well

[1] McDonogh *v.* Calloway, 7 Rob. La. 442; Childress *v.* Perkins, Cooke, Tenn. 87. Jeremy defines an injunction to be "A writ framed according to the circumstances of the case, commanding an act which this Court regards essential to justice, or restraining an act which it esteems contrary to equity and good conscience." Jeremy's Eq., ch. 2, sec. 1, p. 307. Story defines it as "A judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ." 2 Story's Eq., § 861. Again it has been said to be "A prohibitory writ, granted by a court of equity, (in the nature of an *interdictum* in the civil law,) and which may be obtained in a variety of cases to restrain the adverse party in the suit from committing any acts of violation of the plaintiff's rights, as to stay proceedings at law, to restrain the negotiation of notes and other securities, to restrain from committing waste or nuisance,

as preventive, and it may be used both in the enforcement of rights and in the prevention of wrongs.[1] In general, however, it is used to prevent future injury rather than to afford redress for wrongs already committed, and it is therefore to be regarded more as a preventive than as a remedial process.[2] If the injury be already committed, the writ can have no operation to correct it, and equity will not interfere for purposes of punishment, or to compel persons to do right, but only to prevent them from doing wrong.[3] Nor will a court of equity lend its aid by injunction for the enforcement of right or the prevention of wrong in the abstract, and unconnected with any injury or damage to the person seeking the relief.[4]

§ 2. Injunctions are known as mandatory or preventive, according as they command defendant to do or to refrain from doing a particular thing. While the jurisdiction of equity by way of mandatory injunction is rarely exercised and while its existence has even been questioned, it is nevertheless too firmly established to admit of doubt.[5] Mandatory injunctions are seldom allowed before a final hearing,[6] though they may be granted on interlocutory applications.[7] It is to be observed, however, that courts of equity rarely interfere to compel the

or from infringing a patent or copyright." Burr. Law Dict. So it has been defined as "A prohibitory writ, specially prayed for by a bill, in which the plaintiff's title is set forth, restraining a person from committing or doing an act (other than criminal acts) which appears to be against equity and conscience." Bouv. Law Dict.

[1] McDonogh v. Calloway, 7 Rob. La. 442.

[2] Attorney General v. New Jersey etc., 2 Green Ch. 136; Washington etc. v. Green, 1 Md. Ch. 97; Sherman v. Clark, 4 Nev. 138; Blakemore v. Glamorganshire, 1 Myl. & K. 154. The remedy for injuries already committed, though sometimes given as an incident to an injunction, is only allowed where a sufficient showing for the injunction is made out and the injury has resulted from the act enjoined. Sherman v. Clark, 4 Nev. 138.

[3] Attorney General v. New Jersey etc., 2 Green Ch. 136; Bosley v. Susquehanna etc., 3 Bland, 63.

[4] Goodrich v. Moore, 2 Minn. 61.

[5] Garretson v. Cole, 1 Har. & J. 370; Robinson v. Byron, 1 Bro. C. C. 588; Hervey v. Smith, 1 Kay & J. 392; Martyr v. Lawrence, 2 DeGex, J. & S. 261.

[6] Gale v. Abbott, 8 Jur. N. S. 987. And see Washington etc. v. Green, 1 Md. Ch. 97; Rogers etc. v. Erie etc., 5 C. E. Green, 379.

[7] Robinson v. Byron, 1 Bro. C. C. 588; Hervey v. Smith, 1 Kay & J. 392.

doing of a positive act, but the same result is obtained by framing the injunction in an indirect form and prohibiting the defendant from doing the reverse of what he is desired to do.[1] Even then the jurisdiction is exercised with extreme caution, and is confined to cases where the courts of law are unable to afford adequate redress, or where the injury can not be compensated in damages.[2] And in determining whether to grant relief by way of mandatory injunction, courts of equity will take into consideration the relative convenience and inconvenience which would result to the parties from granting or withholding the relief, and will be governed accordingly.[3]

§ 3. With reference to their duration, injunctions are known as interlocutory and perpetual. Interlocutory or preliminary injunctions are such as are granted at any time before final hearing, generally upon the filing of the bill, and continue until the coming in of the answer, or until a hearing upon the merits, or the further order of the court. Perpetual injunctions are granted only at a final hearing upon the merits, and usually form a part of the decree. Indeed a perpetual injunction is in effect a decree of the court whereby defendant is perpetually inhibited from the assertion of an assumed right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience.[4] While therefore an interlocutory injunction, being merely provisional in its nature, does not conclude a right, a perpetual injunction, being a final decree upon a full hearing, is conclusive upon all parties in interest.

§ 4. The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition and, without determining any questions of right, merely to prevent the further perpetration of wrong, or the doing of any act

[1] Lane *v.* Newdigate, 10 Ves. 192; Mexborough *v.* Bower, 7 Beav. 127. But see, *contra*, Akrill *v.* Selden, 1 Barb. 316.

[2] Isenberg *v.* East India etc., 33 L. J. Ch. 392; Deere *v.* Guest, 1 Myl. & Cr. 516.

[3] Isenberg *v.* East India etc., 33 L. J. Ch. 392.

[4] Gilb. Forum Roman, ch. 11. p. 194. But an injunction will not be perpetuated against a party without having him before the court. Chapman *v.* Harrison, 4 Rand. 336.

whereby the right in controversy may be materially injured or endangered. It can not be used for the purpose of taking property out of the possession of one party and putting it into the possession of another, nor does it go to the extent of ordering defendant to undo what he has already done, since it might thereby be productive of as much injury to defendant as that of which the party aggrieved complains.[1] The jurisdiction therefore being exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done, on an interlocutory application for an injunction courts of equity will only act prospectively, and will interpose only such restraint as may suffice to stop the mischief complained of and preserve matters *in statu quo*.[2]

§ 5. It is to be constantly borne in mind that in granting temporary relief by interlocutory injunction courts of equity in no manner anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in statu quo* until a hearing upon the merits, without expressing, and indeed without having the means of forming any opinion as to such rights. And in order to sustain an injunction for the protection of property *pendente lite* it is not necessary to decide in favor of complainant upon the merits, nor is it necessary that he should present such a case as will entitle him to a decree upon the final hearing, since he may be entitled to an interlocutory injunction, although his right to the relief prayed may ultimately fail.[3]

[1] Murdock's Case, 2 Bland, 461; Bosley *v.* Susquehanna, 3 Bland, 63; Farmer's etc. *v.* Reno etc., 53 Pa. St. 224; Washington etc. *v.* Green, 1 Md. Ch. 97.

[2] Blakemore *v.* Glamorganshire etc., 1 Myl. & K. 154. The principle upon which the jurisdiction is exercised is clearly stated in this case by Brougham, Chancellor, as follows: "The leading principle then on which I proceed in dealing with this application, the principle which, as I humbly conceive, ought, generally speaking, to be the guide of the court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur, is, that only such a restraint shall be imposed as may suffice to stop the mischief complained of, where it is to stay a further injury, to keep things as they are for the present."

[3] Great Western etc. *v.* Birmingham etc., 2 Ph. 597.

§ 6. Interlocutory injunctions are distinguished as common and special. The common injunction is granted in aid of or secondary to another equity, as in the case of an injunction to a judgment at law, and is usually issued as of course upon the coming in of the bill stating a sufficient case for the relief, without notice to the opposite party. Special injunctions are granted for the prevention of irreparable injury, as in cases of waste, where the preventive aid of equity is the ultimate and only relief sought. They are generally granted upon notice to the defendant, as in cases of injunction for the infringement of patents, and are not allowed as of course upon the coming in of the bill.[1] Injunctions in the courts of the United States, being granted only upon notice to the opposite party in accordance with statute,[2] are regarded as falling within the class of special injunctions, and when resisted under the notice they will not be granted except upon a strong showing of irreparable injury.[3]

§ 7. Except in cases of special injunctions to stay waste or prevent other irreparable injury, the bill should generally show some primary equity in aid of which the injunction is asked, and the relief is granted as ancillary to or in support of the primary equity whose enforcement is thus sought.[4] And it is incumbent upon the party seeking relief by interlocutory injunction to show some clear legal or equitable rights,[5] and a well-grounded apprehension of immediate injury to those rights.[6] So it is requisite that a complainant seeking the aid of a court of equity by injunction shall not have been guilty of laches or delay in the assertion of his rights; for, while delay may not amount to proof of acquiescence in the wrong

[1] See as to distinction between common and special injunctions, Woodworth v. Rogers, 3 Woodb. & M. 135; Purnell v. Daniel, 8 Ired. Eq. 9; Troy v. Norment, 2 Jones Eq. 318; Peterson v. Matthis, 3 Jones Eq. 31.

[2] See Act of Congress, March 2, 1793, chap. 22, § 5.

[3] Perry v. Parker, 1 Woodb. & M. 280.

[4] Patterson v. Miller, 4 Jones Eq. 451; Washington v. Emery, Ib. 29; Scofield v. Bokkelen, 5 Jones Eq. 342; McRae v. Atlantic etc., Ib. 395.

[5] Scott v. Burton, 2 Ashm. 312.

[6] Kean v. Colt, 1 Halst. Ch. 365.

for which he seeks redress, it may yet suffice to prevent his obtaining relief by injunction.[1]

§ 8. The writ of injunction, being largely a preventive remedy, will not ordinarily be granted where the parties are in dispute concerning their legal rights, until the right is established at law.[2] And if the right for which protection is sought is dependent upon disputed questions of law which have never been settled by the courts of the state, and concerning which there is an actual and existing dispute, equity will withhold relief until the questions of law have been determined by the proper courts.[3] Where, however, the parties are at issue upon a question of legal right and it is necessary to preserve their rights *in statu quo* until the determination of the controversy, an interlocutory injunction may properly be allowed.[4] In such cases courts of equity do not assume jurisdiction to dispose of the legal rights in controversy, but confine themselves to protecting those rights as they then are, pending an adjudication upon the legal questions involved.[5] And it is proper to accompany an injunction granted under such circumstances with a provision for a speedy investigation at law of the questions involved in dispute.[6]

[1] Dulin *v.* Caldwell, 28 Geo. 117; Attorney General *v.* Sheffield etc., 3 DeGex, M. & G. 304.

[2] Hart *v.* Mayor etc., 3 Paige, 213; Mammoth Vein Co.'s Appeal, 54 Pa. St. 183. And see Perry *v.* Parker, 1 Woodb. & M. 280; Chesapeake etc. *v.* Young, 3 Md. 480. In Mammoth Vein Coal Co.'s Appeal, 54 Pa. St. 183, which was a bill for an injunction where parties claimed under different leases of the same coal veins, the relief was denied, the court, Thompson J., saying: "It ought not to be forgotten that a preliminary injunction is a restrictive or prohibitory process, designed to compel the party against whom it is granted to maintain his status merely until the matters in dispute shall by due process of the courts be determined; the sole foundation for such an order being, in addition to cases of the invasion of unquestioned rights, the prevention of irreparable mischief or injury. As a preliminary injunction is, in its operation, somewhat like judgment and execution before trial, it is only to be resorted to from a pressing necessity, to avoid injurious consequences which can not be repaired under any standard of compensation. It is therefore a preventive remedy only."

[3] Stevens *v.* Paterson etc., 5 C. E. Green, 126; Higbee *v.* Camden etc., Ib. 435.

[4] Harman *v.* Jones, 1 Cr. & Ph. 299; Lowndes *v* Bettle, 33 L. J. Ch. 451.

[5] Harman *v.* Jones, 1 Cr. & Ph. 299.

[6] Id.

§ 9. Substantial and positive injury must always be made to appear to the satisfaction of a court of equity before it will grant an injunction, and acts which, though irregular and unauthorized, can have no injurious result, constitute no ground for the relief.[1] So it is a fatal objection to granting an injunction for the protection of property pending litigation that the party seeking the relief has no title to or interest in the property, and no claim to the ultimate relief sought by the litigation.[2] And in no event will an injunction be granted whose effect would be to encourage litigation and a multiplicity of suits, thereby retarding instead of promoting justice.[3]

§ 10. Interlocutory injunctions being often sought for the purpose of harassing and annoying defendants, the utmost care should be observed in the exercise of the jurisdiction, and the relief should only be allowed upon a clear necessity being shown of affording immediate protection to some right or interest of the party complaining which would otherwise be seriously injured or impaired.[4] And where a state of affairs connected with the property touching which an injunction is sought has remained undisturbed for a long period of years, and is such a condition of things as will require an injunction as the ultimate relief in case complainant succeeds in his cause, a preliminary injunction will be withheld, no alteration or change being shown as threatened or impending.[5]

§ 11. The right to a preliminary injunction is not *ex debito justitiæ*, but the application is addressed to the sound discretion of the court to be guided according to the circumstances of the particular case. Hence it is the right and duty of the court or officer granting the writ to require a full disclosure of the facts, and where it is apparent that such disclosure has not been made the relief may properly be refused.[6] But where the danger threatened is of a nature that can not

[1] Rogers *v.* Michigan etc., 28 Barb. 539; Head *v.* James, 13 Wis., 641.
[2] State *v.* McGlynn, 20 Cal. 233.
[3] Endicott *v.* Mathis, 1 Stockt. 110.
[4] Osborn *v.* Taylor, 5 Paige, 515.
[5] Society etc. *v.* Holsman, 1 Halst. Ch. 126.
[6] Reddall *v.* Bryan, 14 Md. 444.

easily be remedied in case of a refusal of relief, and the answer does not deny that the act charged is contemplated, an interlocutory injunction should be allowed unless the equities of the bill are satisfactorily refuted by defendant.[1]

§ 12. The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction, and it may be laid down as a general rule that whenever the rights of a party aggrieved can not be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, a court of equity may properly interpose and afford relief by injunction.[2] And where there is one common right in controversy which is to be established by or against several persons, one person asserting the right against many or many against one, equity may interfere, and instead of permitting the parties to be harassed by a multiplicity of suits determine the whole matter in one action.[3] Complainant however, may be required in such cases to first establish his right at law as a condition precedent to relief in equity.[4]

[1] United States v. Duluth, 1 Dillon's C. C. 469. This was a bill for an injunction to protect certain improvements undertaken by the United States in its navigable waters from injury resulting from works carried on by state authority. Numerous affidavits of engineers and others were offered on both sides as to the effect of the work sought to be enjoined, the opinions expressed being quite conflicting. The court, Miller, J., say: "The affidavits on both sides are numerous. They demonstrate what all courts and juries have so often felt, that where the question is one of opinion and not of fact, though that opinion should be founded on scientific principles or professional skill, the inquiry is painfully unsatisfactory, and the answers strangely contradictory. In this emergency I am relieved by a principle which has generally governed me, and which, I believe, governs nearly all judges, in applications for preliminary injunctions. It is that, when the danger or injury threatened is of a character which can not be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. In this case I am not satisfied that it is so refuted."

[2] Pennsylvania etc. v. Delaware etc., 31 N. Y. 91.

[3] Tenham v. Herbert, 2 Atk. 483; Sheffield etc. v. Yeomans, 2 L. R. Ch. App. 8. And see Crews v. Burcham, 1 Black, 352; Woodruff v. Fisher, 17 Barb. 224.

[4] Pennsylvania etc. v. Delaware etc., 31 N. Y. 91.

§ 13. Where the legal right is not sufficiently clear to enable a court of equity to form an opinion, it will generally be governed in deciding an application for a preliminary injunction by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the writ. And where, upon balancing such considerations, it is apparent that the act complained of is likely to result in irreparable injury to complainant, and the balance of inconvenience preponderates in his favor, the injunction will be granted. But where, upon the other hand, it appears that greater danger is likely to result from granting than from withholding the relief, or where the inconvenience seems to be equally divided as between the parties, the injunction will be refused and the parties left as they are until the legal right can be determined at law.[1] Where a clear case of irreparable injury is shown as likely to result to complainant unless the injunction is granted, and it does not appear that the issuing of the writ will work any such injury to defendants, the relief will be granted.[2]

§ 14. While the protection of trusts is a favorite branch of the jurisdiction of equity, great care is to be exercised in granting injunctions against trustees, lest by tying their hands the trust estate may be left without any representative. Nothing but a case of pressing necessity and imminent probability of great danger from delay will justify a court of equity in divesting a trustee of his trust until he has had an opportunity of answering.[3] And an injunction will not be awarded in the first instance against an executor or trustee upon mere general charges in the bill that he has abused and violated his trust.[4] Nor is the fraudulent abuse of their trust by the directors of a banking corporation respecting the election of

[1] Cory *v.* Yarmouth etc., 3 Hare, 593; Shrewsbury etc. *v.* Shrewsbury etc., 1 Sim. N. S. 410; Attorney General *v.* Mayor etc., 1 Myl. & Cr. 171; Greenhalgh *v.* Manchester etc., 3 Myl. & Cr. 784. And see Hilton *v.* Granville, 1 Cr. & Ph. 283; Morris etc. *v.* Prudden, 5 C. E. Green, 530.

[2] Brown *v.* Pacific etc., 5 Blatch. 525.

[3] Boyd *v.* Murray, 3 Johns. Ch. 48; Ogden *v.* Kip, 6 Johns. Ch. 160.

[4] Boyd *v.* Murray, 3 Johns. Ch. 48.

directors sufficient ground to warrant a court of equity in interfering, there being no charge of abuse of trust or fraud in the management of the ordinary financial concerns of the bank.[1]

§ 15. The object of an interlocutory injunction being the preservation of the property or rights in controversy until a full and final hearing upon the merits, where there are conflicting rights to the possession of property, either personal or real, a court of equity will not upon the unsupported showing of the bill grant an injunction whose effect would be to award possession, and thus determine the merits of the case upon an *ex parte* application.[2] Nor will parties in possession whose rights were acquired by purchase at a sheriff's sale from one in peaceable possession be enjoined from the use and enjoyment of the property by other purchasers claiming adversely to the first vendor, each purchaser being ignorant at the time of purchase of any title save that of his vendor.[3] Where, however, defendant's possession is but an interruption of the prior and lawful possession of complainant, whose right is clear and certain, equity may interfere without compelling complainant to establish his title by an action at law.[4] And an injunction restraining plaintiff in an action at law from molesting defendants in the possession and enjoyment of their property will not prevent the plaintiff from proceeding with his action to try the right.[5]

§ 16. It has already been observed that the granting or withholding of an interlocutory injunction is a matter resting in the sound discretion of the court, to be exercised according to the circumstances of each particular case.[6] It follows there-

[1] Ogden *v.* Kip, 6 Johns. Ch. 160.

[2] Martin *v.* Broadus, Freem. Ch. 35; Deklyn *v.* Davis, Hopk. Ch. 135. And see Conway, *ex parte*, 4 Ark. 302; McGee *v.* Smith, 1 C. E. Green, 462.

[3] Kelly *v.* Morris, 31 Geo. 54.

[4] Conway, *ex parte*, 4 Ark. 302.

[5] Mayor *v.* Magnon, 4 Mart. La., O. S. 2.

[6] Reddall *v.* Bryan, 14 Md. 444. This discretion, however, is by no means an arbitrary one, and is to be exercised in accordance with established principles of law and equity. It has been well said that "The discretion which is to be exercised here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient

fore that the exercise of this discretion is not ordinarily subject to review on error or appeal by a higher court.[1] Nor will *mandamus* lie to control an inferior court or judge in the exercise of such discretion.[2] But with respect to perpetual injunctions the case is somewhat different, and it is error for the court on final hearing to wrongfully make the injunction perpetual or to wrongfully refuse so to do, and such decree may be reviewed by an appellate court.[3]

§ 17. Where one court has in the exercise of its discretion refused an application for an interlocutory injunction, it is merely a question of courtesy whether another of co-ordinate jurisdiction and equal powers shall grant the relief. In such case the jurisdiction of the second court can in nowise be affected by the refusal of the first, nor can the first afterward vacate the injunction ordered by the second except upon a regular hearing of a motion to dissolve.[4] But where one of

to the other. This discretion in some cases follows the law implicitly; in others assists it and advances the remedy; in others again it relieves against the abuse or allays the rigor of it; but in no case does it contradict or overturn the grounds and principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with." Lord Romilly, Master of the Rolls, in Haywood *v.* Cope, 25 Beav. 151, quoting from the Master of the Rolls in Burgess *v.* Wheate, 1 Eden, 214.

[1] Marble *v.* Bonhotel, 35 Ill. 240; Hobart *v.* Ford, 6 Nev. 77. And see Hilbish *v.* Catherman, 60 Pa. St. 444. Though it would seem that an abuse of such discretion may be reviewed by the appellate tribunal. See Thornton *v.* Towns, 34 Geo. 125; Edwards *v.* Banksmith, 35 Geo. 213; Johnson *v.* Allen, Ib. 252. And see opinion of Potts, J., in Attorney General *v.* Patterson, 1 Stockt. 624.

[2] Hays, *ex parte*, 26 Ark. 510; McMillen *v.* Smith, Ib. 613.

[3] Marble *v.* Bonhotel, 35 Ill. 240. The power of revision in such cases is sometimes determined by statute. Thus in Arkansas it is held that the granting and refusing of injunctions being the exercise of a mere ministerial discretion, and the constitution and laws of the state in establishing the circuit court system having given this power expressly to those tribunals in term time, and to the judges thereof in vacation, if an injunction has been improperly refused the appellate court will award a peremptory *mandamus* to the judge of the inferior court, commanding him to grant the writ. Conway et al., *ex parte*, 4 Ark. 302; Pile et al., *ex parte*, 9 Ark. 336.

[4] Welch *v.* Byrns, 38 Ill. 20. And a clerk refusing to issue the writ may be punished for contempt. Id.

two courts of co-ordinate jurisdiction and powers has obtained jurisdiction of a cause it should retain it until finally disposed of, and though both courts may have authority to grant injunctions, yet if one tribunal properly having cognizance of the case has exercised its jurisdiction the other should refuse to interfere.[1]

§ 18. Equity will not grant an injunction for the protection of a naked, legal right which complainant and those under whom he claims have covenanted not to exercise.[2] Nor will the relief be granted against a defendant who in the presence of the court offers to carry out and perform all that complainant upon his own showing is entitled to.[3] And where it is apparent that neither of the parties to the litigation is entitled to the exercise of the right or privilege in controversy, which properly pertains to the public, a court of equity, acting in behalf of the public, will enjoin both parties, although the state is not a nominal party to the cause.[4]

§ 19. The jurisdiction of equity over the right of petition and its authority to restrain private citizens or corporations from invoking legislative action upon public or private interests, is recognized by the English Court of Chancery which will, upon a sufficient showing, restrain parties within its jurisdiction from petitioning Parliament,[5] or the legislature of a foreign country.[6] Notwithstanding the English doctrine, however, the courts of this country refuse to recognize the jurisdiction, and decline to interfere with or enjoin the exercise of the right of petitioning the legislature upon any matter of public or private concern.[7]

§ 20. An injunction becomes effective as to the party enjoined only from the time of actual notice.[8] But it has the

[1] Winn *v.* Albert, 2 Md. Ch. 42.
[2] Bosley *v.* McKim, 7 Har. & J. 468.
[3] Behn *v.* Young, 21 Geo. 207.
[4] The Wharf Case, 3 Bland, 361.
[5] Ware *v.* Grand Junction etc., 2 Russ. & M. 470; Stockton etc. *v.* Leeds etc., 2 Ph. 666.
[6] Bill *v.* Sierra Nevada etc., 1 De Gex, F. & J. 177.
[7] Story *v.* Jersey etc., 1 C. E. Green, 13.
[8] Ramsdall *v.* Craighill, 9 Ohio, 197.

effect of suspending the statute of limitations and a plea of the statute in an injunction case is therefore of no avail.[1] And to render an injunction binding and operative upon a defendant it is not necessary that he should have been officially apprised of its existence, or actually served with the writ. And where a defendant has heard the order of the court granting an injunction, or has in any manner received actual notice of its existence, he is as effectively bound by its provisions as if actually served with process.[2] So if an injunction has been properly granted it will be effective if served upon defendants beyond the jurisdiction of the court, or the limits of the state, it only being necessary that they should be apprised of the order of the court to render it binding.[3]

§ 21. The remedy by interlocutory injunction being preventive in its nature, it is not necessary that a wrong should have been actually committed before a court of equity will interfere, since if this were required it would in most cases defeat the very purpose for which the relief is sought by allowing the commission of the act which complainant seeks to restrain. And satisfactory proof that defendants threaten the commission of a wrong which is within their power is sufficient ground to justify the interference.[4] But the mere insolvency of a defendant, or his inability to respond in damages at law, though it may properly be taken into consideration upon an application for the extraordinary aid of equity by injunction, does not of itself constitute a sufficient foundation for the relief.[5]

§ 22. The disclosure of secrets which have come to one's knowledge during the course of a confidential employment will be restrained by injunction. And where a confidential relationship has existed between parties, out of which one of the

[1] Little *v.* Price, 1 Md. Ch. 182.

[2] Milne *v.* Van Buskirk, 9 Iowa, 558; Hull *v.* Thomas, 3 Edw. Ch. 236; Howe *v.* Willard, 40 Vt. 654; Farnsworth *v.* Fowler, 1 Swan, 1; Skip *v.* Harwood, 3 Atk. 564; Hearn *v.* Tennant, 14 Ves. 136; McNeil *v.* Garratt, 1 Cr. & Ph. 98.

[3] Haring *v.* Kaufman, 2 Beas. 397.

[4] McArthur *v.* Kelly, 5 Ohio, 139.

[5] Heilman *v.* Union etc., 37 Pa. St. 100.

parties has derived information or secrets concerning the other, equity fastens an obligation upon his conscience not to divulge such knowledge and enforces the obligation when necessary by injunction. Thus persons who in the capacity of attorneys, agents, or in other confidential relations, have obtained the custody of the books and documents of their principals, or have come into possession of secrets relating to their affairs, will be restrained from making them public.[1] The rule, however, does not extend to cases where a fraudulent transaction has come to the knowledge of the person occupying the confidential relation, since equity can extend no protection to iniquitous secrets.[2]

§ 23 The subject matter of the jurisdiction of equity being the protection of private property and of civil rights, courts of equity will not interfere for the punishment or prevention of merely criminal or immoral acts, unconnected with violations of private right. Equity has no jurisdiction to restrain the commission of crimes, or to enforce moral obligations and the performance of moral duties, nor will it interfere for the prevention of an illegal act merely because it is illegal. And in the absence of any injury to property rights it will not lend its aid by injunction to restrain the violation of public or penal statutes.[3] Thus the relief has been refused to prevent persons from carrying on the business of banking in violation of a statute restraining unincorporated banking associations.[4] So

[1] Evitt *v.* Price, 1 Sim. 483; Morison *v.* Moat, 9 Hare, 255; Prince Albert *v.* Strange, 1 Mac. & G. 25; Lewis *v.* Smith, Ib. 417; Williams *v.* Prince of Wales etc., 23 Beav. 340.

[2] Gartside *v.* Outram, 3 Jur. N. S. 40.

[3] Attorney General *v.* Utica etc., 2 Johns. Ch. 371; Sparhawk *v.* Union etc., 54 Pa. St. 401; Babcock *v.* New Jersey etc., 5 C. E. Green, 296.

[4] Attorney General *v.* Utica etc., 2 Johns. Ch. 371. The information filed in this case by the Attorney General, *ex officio*, sought to restrain the defendant, a company incorporated for transacting the business of fire and marine insurance, from engaging in banking operations without authority in its act of incorporation, and in direct violation of a public statute prohibiting unincorporated banking associations. Kent, Chancellor, after suggesting that the question involved was purely a legal question, the charge partaking of the nature of a criminal offense, observes as follows: "If a charge be of a criminal nature, or an offense against the public, and does

where it was sought to enjoin defendants from running their street cars on Sunday, contrary to a statute making a violation

not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right, resting in equity, or where the remedy at law was not sufficiently adequate. Nor ought the process of injunction to be applied, but with the utmost caution. It is the strong arm of the court; and to render its operation benign and useful, it must be exercised with great discretion, and when necessity requires it. Assuming the charges in the information to be true, it does not appear to me that the banking power, in this case, produces such imminent and great mischief to the community, as to call for this summary remedy. The English Court of Chancery rarely uses this process, except when the right is first established at law, or the exigency of the case renders it indispensable. Thus, in Brown's case, in 2 Vesey, 414, a motion was made for an injunction to stay the use of a market, and Lord Hardwicke said, it was a most extraordinary attempt, and that the plaintiff had several remedies which he might use. He said it would cause great confusion, to bring into contempt, upon the injunction, all persons who might use the market; and that if the court ought to interpose at all, it would be after the title was established at law. So he observed in another case (Amb. 209. Anon.), that the court granted an injunction to stay the working of a colliery with great reluctance, and will not do it, except where there is a breach of an express covenant, or an uncontroverted mischief. In a late case, before Lord Eldon (Attorney General *v.* Nichol, 16 Vesey, 338,) on an information filed to restrain the defendant from obstructing the ancient lights of a hospital, he stated that the foundation of this jurisdiction, by injunction, was that head of mischief, or those mischievous consequences, which required a power to prevent as well as to remedy, and that there might be nuisances which would support an action, but which would not support an injunction. If the defendants are carrying on banking operations contrary to law, they ought undoubtedly, to be restrained; but I can not be of opinion that the operation is such a mischief or public nuisance as to require the immediate and extraordinary process of this court to abate it. I know that the Court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less preliminarily, by injunction, to put down a *public* nuisance which did not violate the rights of property, but only contravened the general policy. * * * The plain state of the case, then, is that an information is here filed by the Attorney General, to redress, and restrain, by injunction, the usurpation of a franchise, which, if true, amounts to a breach of law, and of public policy. I may venture to say, that such a prosecution is without precedent in this court, but it is supported by a thousand precedents in the courts of law. How, then, can I hesitate on the question of jurisdiction?

of the Sabbath a penal offense, the relief was refused, although the action was brought by pewholders and property owners on the line of defendants' track. In all such cases ample remedy may be had by proceedings at law, and the offense being *damnum absque injuria* courts of equity will not interfere.[1]

The whole question, upon the merits, is one of law, and not of equity. The charge is too much of the nature of a misdemeanor to belong to this court. The process of injunction is too peremptory and powerful in its effects to be used in such a case as this, without the clearest sanction. I shall better consult the stability and utility of the powers of this court, by not stretching them beyond the limits prescribed by the precedents."

[1] Sparhawk *v.* Union etc. Co., 54 Pa. St. 401. This was a bill filed by pewholders in churches and owners of dwelling houses along the line of defendants' street railway, to restrain the running of cars on Sunday. The bill charged that by reason of defendants running their cars on Sunday complainants "have been, and are, and will be deprived of their right of enjoying the Sabbath as a day of rest and religious exercise, free of all disturbance from merely unnecessary and unauthorized worldly employment; that they have been, are, and will be thereby deprived from enjoying peaceably, and without interruption the worship of Almighty God in their accustomed places of public worship, or in their own residences on the Sabbath day; and that the lawful peace of the said day is thereby disturbed and broken; and the rights of property which they possess in their said churches or places of public worship, and in their private residences are and will continue to be thereby infringed upon, and their said churches and residences deteriorated in value." The injunction was denied, Thompson, J., saying: "It seems to me that this is clearly but a charge of the violation of the provisions of the Act of Assembly of 1794, which interdicts worldly employment on the Sabbath day, and that it describes nothing but the consequences which are intended to be prevented by that act. If this be so, then it is not a case of special injury, but only that which results from a public offense or wrong to all, and every one in the community alike where the act is committed. It is not possible, I think, to discover the connection between the cause of complaint and a private injury, excepting in and through the act as prohibited by the statute. And if we are to regard it as a common law offense, the charge in the bill does no more than describe the fruits of the offense. Rest and quiet, on the Sabbath day, with the right and privilege of public and private worship, undisturbed by any mere worldly employment, are exactly what the statute was passed to protect. 10 Casey, 398. The deprivation of these privileges is the sum of the complaint, and this bill is essentially, therefore, a bill to enforce by injunction a penal statute. That is not our province, especially at the suit of a private party."

§ 24. Courts of equity in the exercise of their general jurisdiction for the prevention of fraud are often called upon to interfere by injunction where fraud constitutes the *gravamen* of the bill. The manifestations of fraud are so various that it is impossible to embrace all its varieties of form within the limits of a precise definition. Indeed the courts have generally avoided all attempts in this direction, and have reserved to themselves the liberty to deal with it in whatever aspect it may be presented by human ingenuity. The most frequent instances in which injunctions are granted upon the ground of fraud are in cases where relief is sought against proceedings at law, and to the chapters upon that subject the reader is referred for the principles which govern the interference of equity in such cases.[1]

§ 25. Fraudulent transfers of property, designed to give preference to certain creditors over others, or for the purpose of delaying and hindering creditors, are frequently made the foundation for relief by injunction. And it may be laid down as a general rule that equity will enjoin any transfers of a debtor's property made with intent to defraud and delay his judgment creditors, or to give a portion of such creditors preference over others.[2] And where the main purpose of the bill is to set aside a fraudulent transfer of a debtor's goods and effects, made to delay and hinder his creditors, an injunction is regarded as a necessary adjunct, and is granted as auxiliary to the general relief sought.[3]

§ 26. It is to be observed, however, that the jurisdiction is not exercised in favor of mere contract creditors, or creditors at large, whose claims are not yet reduced to judgment, and in the absence of statutory provisions authorizing the relief, courts of equity will not at the suit of other than a judgment creditor interfere by injunction to restrain a debtor from any disposition of his property, however fraudulent, which he may see fit to make.[4] The principle on which the rule is based is that until

[1] See Chapters II. and III., *post*.

[2] Hyde *v.* Ellery, 18 Md. 496; Witmer's Appeal, 45 Pa. St. 455.

[3] Hyde *v.* Ellery, 18 Md. 496.

[4] Wiggins *v.* Armstrong, 2 Johns. Ch. 144; Holdrege *v.* Gwynne, 3 C. E. Green, 26; Young *v.* Frier, 1 Stockt. 465; Uhl *v.* Dillon, 10 Md. 500; Rich

the creditor has established his claim by judgment he has no right to question the acts of his debtor and has no concern with his frauds; and to allow the interference on behalf of mere general creditors before judgment would lead to an unjustifiable and often oppressive interruption of the exercise of the debtor's right to control his property.[1]

v. Levy, 16 Md. 74; Phelps v. Foster, 18 Ill. 309; Bigelow v. Andress, 31 Ill. 322; Rhodes v. Cousins, 6 Rand. 188. But see, *contra*, Cottrell v. Moody, 12 B. Mon. 500.

[1] Wiggins v. Armstrong, 2 Johns. Ch. 144. Kent, Chancellor, observes: "This is a case of a creditor on simple contract, after an action commenced at law, and before judgment, seeking to control the disposition of the property of his debtor, under judgments and executions, upon the ground of fraud. My first impression was in favor of the plaintiffs; but upon examination of the cases, I am satisfied that a creditor at large, and before judgment and execution, can not be entitled to the interference which has been granted in this case. In Angell v. Draper, (1 Vern. 399,) and Shirley v. Watts, (3 Atk. 200,) it was held, that the creditor must have completed his title at law, by judgment and execution, before he can question the disposition of the debtor's property; and in Bennet v. Musgrave, (2 Ves. 51), and in a case before Lord Nottingham, cited in Balch v. Wastall, (1 P. Wms. 445,) the same doctrine was declared, and so it is understood by the elementary writers. (Mitford, 115. Cooper Equ. Pl. 149.) The reason of the rule seems to be, that until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds. On the strength of settled authorities, I shall, accordingly, grant the motion for dissolving the injunction." So it is said in Rhodes v. Cousins, 6 Rand. 188, to be "well-settled law that none but a judgment creditor can have the assistance of equity to control, prevent, or interfere with in any way, the disposition which a debtor may choose to make of his property. He may destroy it, give it away, convey it fraudulently, or sell it and waste the money, and no creditor at large can stop him by injunction. A creditor must have proceeded as far as he can at law. If he means to affect the land, he must have a judgment at law and take his *elegit*. If the personalty there must be a judgment and execution issued and he must show in his bill that he has done this, or it may be demurred to." An exception has been taken in the case of trespass for malicious injury to property, and a plaintiff, in such case, before judgment recovered has been allowed to enjoin defendants from fraudulently disposing of their property to evade the payment of such damages as might be awarded in the action at law, the relief being granted on the ground that the ancillary jurisdiction of the court of equity by injunction was necessary for the protection of plaintiff in his legal remedy. Cottrell v. Moody,

§ 27. In conformity with the principles enunciated in the previous section, an injunction has been refused, pending a trial at law, where it was sought to restrain defendants from disposing of their goods in order that they might be levied upon under the judgment not yet obtained.[1] So where a clerk has embezzled the goods of his employers and converted them into money which he has deposited in bank to his own credit, he will not be enjoined from disposing of the money on the ground that he has no other property and is about to leave the country, it not appearing that the money was the specific money of complainants, or that it had arisen from the sale of their goods.[2] Nor will a garnishee be restrained from disposing of his property in the absence of any allegations that there is danger of loss by reason of his insolvency before a trial can be had in the action at law.[3]

§ 28. Where fraud is relied upon as the foundation for an injunction, the allegations in the bill must be of specific and definite acts of fraud, and not mere general averments; and in the absence of such specific allegations a court of equity will not interfere, although irreparable injury is alleged.[4]

§ 29. Nor is the rule requiring specific averments of fraud relaxed, even where a statute authorizes the interference of equity to restrain fraudulent assignments of a debtor's property in derogation of the rights of creditors before judgment, since in such cases the courts require strong *prima facie* evidence of the facts on which complainant's equity rests.[5] And mere allegations that complainant fears and believes defendant is about to perpetrate a fraud upon him by placing his effects beyond the reach of his creditors, are not sufficient to justify the court in granting relief.[6] But it has been held under a statute authorizing injunctions on behalf of general creditors

12 B. Mon. 500. The exception, however, is in conflict with the current of authority.

[1] Phelps *v.* Foster, 18 Ill. 309.

[2] McKenzie *v.* Cowing, 4 Cranch C. C. 479.

[3] Bigelow *v.* Andress, 31 Ill. 322.

[4] Powell *v.* Parker, 38 Geo. 644.

[5] Lanpheimer *v.* Rosenbaum, 25 Md. 219.

[6] Hubbard *v.* Hubbard, 14 Md. 356.

before judgment, to prevent a fraudulent disposition of the debtor's property, that allegations that the debtor has, by a fraudulent bill of sale, placed his property beyond the reach of legal process are as effective as averments of insolvency, and it appearing that no other property of the debtor can be found, save that covered by the bill of sale, the injunction should be awarded.[1]

§ 30. It is always a sufficient objection to the granting of an injunction that the party aggrieved has a full and adequate remedy at law, and it is a well-established rule that courts of equity will not lend their aid for the protection of rights or the prevention of wrongs where the ordinary legal tribunals are capable of affording sufficient redress.[2] And where it does not appear that the remedy at law is inadequate, or that the party aggrieved is entitled to more speedy relief than can be obtained by the ordinary process of courts of law, an injunction will be refused.[3] Thus, where complainant's equity is based upon a claim for unliquidated damages for a substantive injury for which ample remedy exists at law, and there is no impediment to bringing the action in a legal forum, an injunction will not be granted.[4] And when it is apparent on the face of the bill that a court of chancery has no jurisdiction of the subject matter of the cause, and that the party aggreived had an adequate remedy at law, the bill is obnoxious to a demurrer.[5]

§ 31. Where a positive statutory remedy exists for the redress of particular grievances, a court of equity will not interfere by injunction and assume jurisdiction of the questions involved, nor will it enjoin proceedings under such statutory remedy, since such interference would place the

[1] Conolly v. Riley, 25 Md. 402.

[2] Coe v. Columbus etc., 10 Ohio St. 372; Coughron v. Swift, 18 Ill. 414; Winkler v. Winkler, 40 Ill. 179; Poage v. Bell, 3 Rand. 586; Webster v. Couch, 6 Rand. 519; Akrill v. Selden, 1 Barb. 316; Sherman v. Clark, 4 Nev. 138; Mullen v. Jennings, 1 Stockt. 192; Wooden v. Wooden, 2 Green Ch. 429.

[3] Mullen v. Jennings, 1 Stockt. 192; Hart v. Marshall, 4 Minn. 294.

[4] Webster v. Couch, 6 Rand. 519.

[5] Winkler v. Winkler, 40 Ill. 179.

judicial above the legislative power of the government.[1] Legal rights should be left to the decision of a legal forum, and in the absence of special circumstances warranting the interposition of the extraordinary aid of courts of equity, such courts will not interfere to protect a purely legal right, properly triable at law.[2] And the assertion of a right whose

[1] Brown's Appeal, 66 Pa. St. 155. In this case a landlord had begun proceedings before a justice of the peace, in pursuance of a statutory remedy, to recover possession of premises demised; before judgment the proceedings were enjoined in the Common Pleas. Thompson, C. J., says: "The Landlord and Tenant Act, of 1863, provides an ample remedy whereby to recover possession of leased premises when it is alleged that the term has expired. It is not a one-sided remedy, for it allows the defendant ample scope to allege and prove any legal defense he may have against the plaintiff's demand, with the right of review by appeal or *certiorari*. It is a complete system for that species of controversy. I do not know that it is a wise system; that may be doubted, but it is complete in itself. Proceedings under this system were legally and regularly begun by the defendants, as appears by the records before us; but before a final result was arrived at, the Court of Common Pleas interposed by injunction and stopped them. The reason assigned for this was, supposed hardship upon the plaintiffs, if the plaintiffs in the proceeding repossessed themselves of what they had leased to the defendants. This was manifest interference without authority of law. The court had no jurisdiction in equity of the proceedings. They were not contrary to law; and if they had been, an injunction was not a correctional process. That was to be done by the process provided in the act, viz.: by appeal or *certiorari*. These were the legal matters provided in the act, and a court of equity could not supplement them. Courts may restrain acts contrary to law, but not where they are according to positive law. That would be to put the courts above the legislature. Where a positive statutory remedy exists and may be pursued, equity can not interfere on the ground of irreparable mischief. The 'law injures no one' is a maxim which inculcates obedience to law. Where positive law in point of fact injures, it is the legislature which must furnish the corrective; courts can not. Irreparable damages can not be alleged against statutory remedies legally pursued, and that was the case of the plaintiffs before the magistrate. These principles are plain, and need neither authority nor elaboration to substantiate. We think the court below had no jurisdiction in equity to restrain these defendants from proceeding under the Landlord and Tenant Act referred to, to try their right to repossess themselves of the leased premises in question. The decree in the case is therefore reversed, and the bill is dismissed at the cost of the appellees."

[2] Wooden *v.* Wooden, 2 Green Ch. 429.

existence or non-existence is properly determinable at law, and the exercise of which can do no injury to the party denying the existence of the right, affords no ground for equitable interference.[1] And in the courts of the United States the objection to granting relief by injunction, that the party aggrieved has ample remedy at law, need not be taken in the pleadings, but may be enforced by the court *sua sponte*, since it goes to the jurisdiction of the forum.[2]

§ 32. Interlocutory injunctions are usually, though not always, granted upon the filing of a bill setting forth complainant's equities and concluding with a prayer for the relief. But the writ will not be granted under the general prayer of the bill, and it must be specifically prayed, as well in the prayer for process as in that for relief; otherwise the bill is demurrable.[3] And though the omission of the prayer for the injunction is regarded as a defect in form, yet it is error to grant an injunction upon a bill thus defective.[4] Where, however, a court of equity has already acquired jurisdiction over the subject matter of the action and of the parties thereto, it would seem that no bill is necessary. And wherever the court has power to make an order which a party to the action is bound to obey, in consequence of his being either actively or constructively a party to the suit, it may enforce obedience to its order by the process of injunction issued upon a petition in the cause without the filing of a bill.[5] But the writ will not be allowed in an improper case, even by the consent of both parties, especially where the rights of third persons intervene.[6]

[1] Doughty *v.* Somerville etc., 3 Halst. Ch. 51.

[2] Parker *v.* Winnipiseogee etc., 2 Black, 545. The decision is based upon the sixteenth section of the Judiciary Act of 1789, which provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy can be had at law."

[3] Lewiston etc. *v.* Franklin etc., 54 Maine, 402; Union Bank *v.* Kerr, 2 Md. Ch. 460; Wood *v.* Beadell, 3 Sim. 273.

[4] Primmer *v.* Patten, 32 Ill. 528.

[5] In the matter of Hemiup, 2 Paige, 316.

[6] Whelpley *v.* Erie, 6 Blatch. 271.

§ 33. Where an injunction is sought merely as auxiliary to an action already begun, and the object desired can be as readily obtained by a motion in the original action, a new suit will not be entertained which is instituted for the sole purpose of obtaining such injunction, since the exercise of the jurisdiction under such circumstances would be an encouragement to vexatious litigation.[1]

§ 34. The jurisdiction of equity by way of injunction being, as we have already seen, strictly *in personam*, it will not be exercised against persons and property beyond the borders of the state in which the proceedings are instituted. Neither law nor comity between distinct state governments recognizes the authority of one state to exercise jurisdiction over citizens and property beyond its borders.[2]

§ 35. An injunction, being a harsh remedy, will not be granted in the first instance except upon a clear *prima facie* case and upon positive averments of the equities on which the application for the relief is based. And while it is not essential that complainant should establish his case upon an application for an interlocutory injunction with the same degree of certainty that would be required upon the final hearing, he must nevertheless allege positively the facts constituting his grounds for relief.[3] Thus it is well established that the mere allegation of irreparable injury will not suffice to warrant an injunction, but the facts must appear on which the allegation is predicated in order that the court may be satisfied as to the nature of the injury.[4] Nor will merely argumentative allegations, or inferences from the facts stated, suffice to meet the requirements of the rule.[5]

§ 36. The relief will not ordinarily be allowed where the facts upon which complainant's equities rest are stated only upon information and belief, but they should be made to

[1] Hamer v. Kane, 7 Nev. 61.

[2] Western Union etc. v. Pacific etc., 49 Ill., 90.

[3] Jones v. Macon etc., 39 Geo. 138; Perkins v. Collins, 2 Green Ch. 482; Holdrege v. Gwynne, 3 C. E. Green, 26; Campbell v. Morrison, 7 Paige, 157; Bank of Orleans v. Skinner, 9 Paige, 305; Bogert v. Haight, Ib. 297.

[4] Branch etc. v. Supervisors, 13 Cal. 190.

[5] Battle v. Stephens, 32 Geo. 25.

appear by positive averments founded on complainant's own knowledge,[1] or that of some person cognizant of the facts.[2] Nor will it suffice that the averments of the bill are made upon the information of the party complaining without stating his sources of information.[3] And an injunction granted *ex parte* where some of the material allegations of the bill are stated on information and belief, can not be sustained in the absence of proof of their correctness. To sustain an injunction granted without notice, all the essential and material allegations which are not positively stated in the bill must be otherwise proved.[4] Nor do the mere apprehensions and fears of complainant, unsustained by facts establishing their probability, constitute a sufficient ground to warrant the interference of equity by injunction.[5]

§ 37. As regards the verification of the bill on which the writ is granted, it is held that the affidavit should be such as to submit the party to the penalties of perjury if its averments prove untrue, and it is not sufficient to swear that the material allegations are true on knowledge and belief.[6] Nor will it suffice that the party verifying swears absolutely to the truth of the "material facts" of the bill, it being too uncertain what are the material facts.[7] Nor is it sufficient that he swears that the facts and allegations of the bill, which render an injunction necessary, are true and correct.[8]

§ 38. Although it is generally requisite that an injunction bill should be verified by the oath of complainant or other person cognizant of the facts, yet this is not in all cases indispensable. It will suffice if the confidence of the court is obtained, and this may be done as well by documentary evidence where such evidence satisfactorily establishes complain-

[1] Jones *v.* Macon etc. 39 Geo. 138; Armstrong *v.* Sanford, 7 Minn. 49.
[2] Youngblood *v.* Schamp, 2 McCart. 42.
[3] Blondheim *v.* Moore, 11 Md. 365.
[4] Dinehart *v.* Lafayette, 19 Wis. 677.
[5] Warfield *v.* Owens, 4 Gill, 364.
[6] Reboul's Heirs *v.* Behrens, 5 La. 79; Catlett *v.* McDonald, 13 La. 44.
[7] Sauvinet *v.* Poupono, 14 La. 87.
[8] Hebert *v.* Joly, 5 La. 50; Ricard's Heirs *v.* Hiriart, Ib. 244.

ants' equities.[1] And if it is apparent upon a final hearing that complainant is entitled to an injunction, it will not be refused because the bill is not verified.[2] But the relief will not be allowed upon a bill whose material averments are all denied by the answer of defendants under oath.[3] If, however, the bill charges forgery as one of the grounds for relief, a denial in the answer, upon information and belief, will not prevent the issuing of the writ.[4]

§ 39. The writ of injunction should contain a description of the particular things or acts concerning which the defendant is enjoined, in order that there may be no opportunity for misapprehension.[5] No particular form, however, is required, and the writ will, of course, be varied to meet the peculiar circumstances of each particular case. It is sufficient that it be an authentic notification to the defendant of the mandate of the court, which he must then obey at his peril.[6]

§ 40. The court may, under certain circumstances, grant an injunction upon the final hearing of the cause, although not prayed for by the bill.[7] And it has been held that after a decree in a foreclosure suit, the mortgagor in possession may be restrained from committing waste, though no injunction is sought by the bill.[8]

§ 41. It is within the discretion of a court of equity to revive an injunction after it has been dissolved, and upon a proper showing of complainant's right to relief the injunction will be reinstated, the court being regarded as always open for this purpose.[9] And where sufficient facts are stated in a

[1] Negro Charles *v.* Sheriff etc., 12 Md. 274.
[2] Hawkins *v.* Hunt, 14 Ill. 42.
[3] Lady Bryan etc. *v.* Lady Bryan etc., 4 Nev. 414.
[4] United States *v.* Parrott, McAll. C. C. 271.
[5] Whipple *v.* Hutchinson, 4 Blatch. 190.
[6] Summers *v.* Farish, 10 Cal. 347.
[7] Blomfield *v.* Eyre, 8 Beav. 250.
[8] Goodman *v.* Kine, 8 Beav. 379.
[9] Tucker *v.* Carpenter, Hemp. 441; Radford's Ex'rs. *v.* Innes' Executrix, 1 Hen. and Mun. 8; Billingslea *v.* Gilbert, 1 Bland, 568. In Tucker *v.* Carpenter, Johnson, J., delivering the opinion of the court, says: "A writ of injunction may be said to be a process capable of more modifications than any other in the law; it is so malleable that it may be moulded to suit

supplemental bill to warrant an injunction it will be granted, although the injunction granted on the original bill has been dissolved.[1] But when a second bill is filed to obtain a second injunction, in relation to the same subject matter and between the same parties, it is not enough to allege new grounds of equity not suggested in the former bill; it must be shown that the new equity alleged did not exist at the time the original bill was filed, or, if it existed, that it was unknown to the complainant.[2] Nor will an injunction, once dissolved, be reinstated simply upon new evidence, no new ground of equity being stated which was not alleged in the original bill.[3]

§ 42. Under a statute prohibiting a second *ex parte* application to an officer out of court, after the court has refused an injunction, complainant will not be allowed the relief upon a new bill substantially the same as the first.[4] So if, after argument, the court has dissolved an injunction granted on the original bill, and complainant then applies to another officer, *ex parte*, upon a bill containing substantially the same grounds, no injunction will be allowed.[5] And where after dissolution a bill precisely similar to the first is filed by another party to obviate a difficulty arising in the former suit, it being apparent that the second bill is filed in the interest of the former complainant in whose behalf the relief is sought, an injunction will be refused.[6]

§ 43. While the right of the party complaining to amend his bill and renew the application, even after a dissolution upon the merits, may be regarded as clearly established by the

the various circumstances and occasions presented to a court of equity. It is an instrument in its hands capable of various applications for the purpose of dispensing complete justice between the parties. It may be special, preliminary, temporary, or perpetual; and it may be dissolved, revived, continued, extended, or contracted; in short it is adapted and used by courts of equity as a process for preventing wrong between, and preserving the rights of parties in controversy before them."

[1] Fanning *v.* Dunham, 4 Johns. Ch. 35.

[2] Bank of U. S. *v.* Schultz, 3 Ohio, 61.

[3] Lowry *v.* McGee, 5 Yerg. 238.

[4] Cummins *v.* Bennett, 8 Paige, 79.

[5] Harrington *v.* American etc., 1 Barb. 244

[6] Endicott *v.* Mathis, 1 Stockt. 110.

authorities,[1] yet the exercise of the right is guarded with much caution, and it is only to be permitted under such peculiar circumstances as indicate that the promotion of justice requires it.[2] And where an injunction has been dissolved for want of equity in the bill an *ex parte* injunction will not be granted upon an amended bill, or upon a new one supplying the equity of the old, but the court will require notice to the opposite party.[3] Where an injunction has already been granted and is still in force, its repetition is derogatory to the authority of the court and will not be allowed.[4] And where the relief sought is purely preventive a court of equity will not continue or perpetuate an injunction after the cause for which it was granted has been removed and the rights of complainant are no longer in danger.[5] But, though the writ was improperly granted in the first instance, if it has been allowed to stand until final hearing, it is not error then to perpetuate it, sufficient equity appearing.[6]

[1] Buckley *v.* Corse, Saxt. 504.

[2] Calderwood *v.* Trent, 9 Rob. La. 227.

[3] Hornor *v.* Leeds, 2 Stockt. 86. The reason for the rule is forcibly stated in this case by Williamson, Chancellor, as follows: "I lay down the rule that where an injunction has been dissolved for want of equity in the bill, this court ought not to grant an *ex parte* injunction upon an amended bill, or upon a new bill supplying that equity. If a complainant is willing to swear to a case fitting the opinion of the court, the rights of a defendant should not be interfered with upon such a bill, without affording the defendant an opportunity of being first heard."

[4] Livingston *v.* Gibbons, 4 Johns. Ch. 571.

[5] Wiswell *v.* First Congregational Church, 14 Ohio St. 31.

[6] Clark *v.* Young, 2 B. Mon. 57.

CHAPTER II.

OF INJUNCTIONS TO RESTRAIN PROCEEDINGS AT LAW BEFORE JUDGMENT.

I. GROUNDS OF THE JURISDICTION.
II. SUITS IN FOREIGN COURTS.
III. SUITS PERTAINING TO REAL ESTATE.
IV. SPECIAL CASES.

I. GROUNDS OF THE JURISDICTION.

§ 44. Courts of equity do not restrain courts of law, but only parties litigant.
45. General rule, and illustrations thereof.
46. Suit will not be enjoined where defense may be made at law.
47. Parties will be confined to the original forum.
48. Of suits in equity.
49. Bill should show state of the pleadings at law.
50. Of the parties to the suit.
51. Where application should be made to the court in action pending.
52. Of confessing judgment before obtaining injunction.
53. Bill of peace.
54. Injunction not allowed merely to obtain consolidation of suits.
55. Where defense can not be made at law; suits on notes.
56. Failure of consideration.

§ 44. No branch of the jurisdiction of equity by injunction is so frequently invoked as that which pertains to the restraint of judicial proceedings, both before and after judgment. In the exercise of this jurisdiction courts of equity claim no supremacy over courts of law, since the injunction is in no sense a prohibition upon the action of the legal tribunals. The injunction is directed, not to the court, but to the litigant parties, and in no manner denies the jurisdiction of the legal tribunal. It merely seeks to control the person to whom it is

addressed, and to prevent him from using the process of courts of law where it would be against conscience to allow him to proceed. It is granted on the ground that an unfair use is being made of the legal forum which, from circumstances of which equity alone can take cognizance, should be restrained lest an injury be committed wholly remediless at law.[1]

§ 45. In general it may be said that where through fraud, accident, or mistake, such an advantage will be gained in a suit at law as will render it an instrument of great injustice, and it is against conscience to allow the suit to proceed, equity will interfere by injunction.[2] Thus, a suit on an indemnity bond has been enjoined where it had been given through mistake, the obligor supposing he was signing a recognizance.[3] And where the contract on which a suit is brought was entered into on mistaken and false representations, the proceedings may be enjoined.[4] So a suit upon promissory notes is properly enjoined where it appears that the notes were given in exchange for an interest in certain other notes which had been obtained through fraudulent representations in a sale of patent rights.[5] And where fraud is relied upon as the ground for relief, it is not necessary that the facts should be proved precisely as alleged, but it will be sufficient if they are proved in substance.[6] So undue influence exercised upon the maker of a note, who was a person of weak intellect, and constantly given to intoxication, has been deemed sufficient ground for restraining a suit upon the note.[7] But fraudulent representations made

[1] 2 Story's Eq., § 875; Hill v. Turner, 1 Atk. 516. In Williams v. Sadler 4 Jones Eq. 378, it is held that the ordinary and usual course is to allow proceedings as far as judgment, and to interfere only for the purpose of enjoining the execution. I am not aware of any other authority holding this doctrine, and it may be regarded as the well-settled practice of courts of equity to interfere, on proper cause shown, at any stage of the proceedings, without waiting for judgment to be had.

[2] 2 Story's Eq., § 885; Sacket v. Hillhouse, 5 Day, 551; Dale v. Roosevelt, 5 Johns. Ch. 174; Field v. Cory, 3 Halst. Ch. 574.

[3] Field v. Cory, 3 Halst. Ch. 574.

[4] Dale v. Roosevelt, 5 Johns. Ch. 174.

[5] Sacket v. Hillhouse, 5 Day, 551.

[6] Id.

[7] Rembert v. Brown, 17 Ala. 667.

by the payee to the maker of a promissory note, will not warrant an injunction against a suit by a *bona fide* holder of the note for valuable consideration.[1] Nor will the prosecution of a writ of error to a judgment be enjoined because of mistakes in the bill of exceptions, no fraud being shown.[2] The injunction will be dissolved where the answer fully disproves the allegations of fraud, and shows a *bona fide* debt and full consideration, it not appearing that the suits, though several in number, were vexatious or malicious.[3] And to warrant the interference a clearly-established case of fraud, accident, or mistake, must be shown sufficient to deprive the person aggrieved of a defense at law.[4] The loss of one conveyance in a chain of title is sufficient to warrant equity in enjoining proceedings at law to get possession of the premises, as well on the ground of accident whereby a defense can not be perfectly made at law, as from the necessity of preventing a cloud upon title.[5]

§ 46. The most frequent ground for refusing relief by injunction against a suit at law is that the defense urged may be used in the action at law itself, without resort to equity. And it may be laid down as a general rule that legal proceedings will not be enjoined on grounds of which the person

[1] Dougherty *v.* Scudder, 2 C. E. Green, 248.

[2] Ford *v.* Weir, 24 Miss. 563.

[3] Jackson *v.* Darcy, Saxt. 194.

[4] Rogers *v.* Cross, 3 Chand. 34.

[5] Butch *v.* Lash, 4 Iowa, 215. But see, *contra*, Rogers *v.* Cross, 3 Chand. 34. Butch *v.* Lash illustrates very clearly some of the grounds upon which equity will interpose to stay proceedings at law. Complainant in the injunction suit being sued at law for the recovery of certain real estate, and his chain of title being defective, one deed therein having been lost before recorded, the court below decreed a perpetual injunction against the proceedings at law. The decree was affirmed by the appellate court, Wright, C. J., saying: "The respondent's action was brought to test the legal title to this property, and in the legal forum he was entitled to succeed, if his title, in this respect, was superior to that of complainant. Owing to the loss and failure to record the deed to Linder, complainant was unable to show a complete chain by the title papers or record. And, under such circumstances, we think he was fully justified in asking equitable aid to ascertain the existence of such deed. We can not say that his defense would have been adequate and complete at law. But a further and conclusive consideration in favor of the bill, is, that complainant

aggrieved may avail himself in defense of the action at law.[1] In illustration of the rule, where complainant files a bill to set aside certain securities as void, and is afterward sued at law upon the securities, having a good defense to the action at law, he will not be allowed to enjoin the prosecution of such suit until after he has obtained a decree in equity.[2] Nor, in such case, will the neglect of the defendant in the chancery suit to object to the jurisdiction of the court, entitle complainant to a preliminary injunction restraining the suit at law.[3] So proceedings at law will not be enjoined on the ground of want of jurisdiction in the court in which the proceedings are instituted, since such want of jurisdiction can be relied upon in defense of the action at law.[4] Nor will the fact that plaintiff at law has no cause of action, as in an action of forcible entry and detainer that he has no title, warrant relief in equity against the suit.[5] So an injunction will be refused to a suit on a note, the only equity relied upon being that a certain payment has not been credited, and complainant making no tender of the remainder.[6] Nor does the fact that the proceedings sought to be enjoined are in a court of equity alter or vary the rule, since if the person aggrieved has a good defense to the equitable action it is equally as competent for him to urge such

asked equitable interposition on the ground of accident, and to remove a cloud upon his title. To relieve against an injury resulting from accident, is a very ancient branch of equitable jurisdiction. * * * The loss of the deed is expressly shown by the complainant's sworn bill; there is no pretense that it occurred from any negligence or misconduct on his part. The respondent had procured a conveyance from the county, which was a cloud upon complainant's title; and to avoid the effect of this loss, and remove this cloud, he might reasonably and properly ask relief at the hands of the chancellor."

[1] New York etc. *v.* American etc., 11 Paige, 384; Beauchamp *v.* Putnam 84 Ill. 378; Smith *v.* Short, 11 Iowa, 523; Powell *v.* Chamberlain, 22 Geo 123; Gibson *v.* Moore, 22 Tex. 611. But see, *contra*, Bullitt's Ex'rs. *v.* Songster's Adm'rs., 3 Munf. 55.

[2] New York etc. *v.* American etc. 11 Paige, 384.

[3] Id.

[4] Gibson *v.* Moore, 22 Tex. 611.

[5] Chadoin *v.* Magee, 30 Tex. 476.

[6] Powell *v.* Chamberlain, 22 Geo. 123.

matter in his answer to that action as in a bill to enjoin.[1] So where the illegality of an instrument is apparent upon the face of the instrument itself, so that lapse of time can not weaken or take away the defense whenever action may be brought, there is no ground for relief in equity.[2] But where the illegality is only to be made apparent by evidence *dehors* the instrument, the rule is otherwise.[3]

§ 47. The propriety of confining litigation to the forum in which it is first commenced, has repeatedly been recognized by courts of equity, and an injunction will generally be allowed to prevent either party from removing the litigation into another court.[4] Especially will the jurisdiction be exercised to restrain one from the removal of his cause after an adverse decision in the court to which he had first resorted.[5] Nor is the application of the rule affected by the fact that the court subsequently acquiring jurisdiction of the subject matter, and in which the proceedings are sought to be enjoined, has equity as well as common law powers.[6] In all such cases the parties will be left to contest their rights in the original forum, since any other rule would necessarily lead to great abuse and render chancery an instrument of great injustice.[7]

§ 48. It is also to be observed that an injunction will not be allowed against an action at law, pending a suit in chancery embracing the same subject matter and in which the relief, if necessary, might be granted.[8] Nor will equity usually grant an injunction to stay proceedings in the same court of equity, either on the application of parties to the suit or of a stranger, since a departure from the rule would lead to interminable litigation.[9]

§ 49. The bill should show the precise state of the plead-

[1] Hall *v.* Fisher, 1 Barb. Ch. R. 53.
[2] Gray *v.* Mathias, 5 Ves. 286.
[3] Bromley *v.* Holland, 5 Ves. 617.
[4] Conover *v.* Mayor etc., 25 Barb. 531; Crane v. Bunnell, 10 Paige, 333.
[5] Conover *v.* Mayor, etc., 25 Barb. 531.
[6] Id.
[7] Crane *v.* Bunnell, 10 Paige, 333.
[8] Washington *v.* Emery, 4 Jones Eq. 29.
[9] Smith *v.* American etc., 1 Clarke Ch. 307; Lane *v.* Clark, Ib. 309.

ings in the suit which is sought to be enjoined, as well as the court in which the suit is pending, to enable the officer granting the injunction to judge of its propriety, and to fix the terms upon which the relief will be allowed.[1] And if in addition to the prayer for injunction, the bill prays for a discovery of matters material to the defense of the suit at law, the nature of the defense at law must clearly appear in the bill before equity will enjoin the suit.[2]

§ 50. As regards the parties for and against whom the jurisdiction will be exercised, it is to be remarked that an injunction will not be granted in aid of a suit against one not a party to the suit.[3] Nor will the relief be allowed in behalf of one not a party to the suit sought to be enjoined.[4] But the jurisdiction of chancery to restrain suits at law against its officers acting under its direction, is old and well established, and will be exercised even though the parties by whom the proceedings at law are instituted are not parties to the suit in chancery.[5] And where one has instituted a suit in the name of another, but without his consent and without authority, either legal or equitable, the proceedings may be enjoined.[6]

§ 51. Where it is sought to stay or enjoin proceedings in equity by one who is a party or privy to the proceedings, the application should be made directly to the court itself in the action pending, and an officer outside of court has no authority to enjoin such proceedings.[7]

§ 52. It has been held that where one comes into equity for relief against proceedings at law, and seeks on equitable grounds to enjoin such proceedings, the relief will be granted only on condition of his first confessing judgment at law.[8]

[1] Carroll *v.* Farmers etc., Harring. Mich. 197.

[2] McIntyre *v.* Mancius, 3 Johns. Ch. 45.

[3] Chamblin *v.* Slichter, 12 Minn. 276.

[4] New York *v.* Connecticut, 4 Dall. 1.

[5] Bailey *v.* Devereux, 1 Vern. 269; Frowd *v.* Lawrence, 1 Jac. & W. 655; *Ex parte* Clarke, 1 Russ. & M. 563.

[6] *Ex parte* Merrit, 5 Paige, 125.

[7] Dyckman *v.* Kernochan, 2 Paige, 26; Ellsworth *v.* Cook, 8 Paige, 643.

[8] Warwick *v.* Norvell, 1 Leigh, 96; Mathews *v.* Douglass, Cooke, Tenn. 186; Conway *v.* Ellison, 14 Ark., 360; Nelson *v.* Owen, 3 Ired. Eq. 175.

The principle upon which the rule is based, is said to be that whenever a person resorts to equity for substantive relief against a claim asserted at law, he must submit himself entirely and without reserve to the jurisdiction of the chancellor.[1] The rule, however, if rule it may be called, is by no means inflexible, and where one has a distinct ground of equitable relief aside from his defense at law, he is not obliged to abandon his legal defense by confessing judgment before proceeding in equity to enjoin the suit at law.[2] But, where complainant in his bill expressly offers to withdraw his defense at law and submit to judgment, for the reason that his relief is alone in equity, he is entitled to an injunction.[3]

§ 53. Equity will interfere to restrain proceedings at law upon a bill in the nature of a bill of peace, whose object is to restrain useless and vexatious litigation, and to prevent a multiplicity of suits.[4] But a bill of peace will only be entertained in two classes of cases: first, where complainant has already sufficiently established his right at law; [5] and, second, where the persons controverting the right are so numerous as to render the injunction necessary for the prevention of a multiplicity of suits.[6] And where the suit is between two persons, and but one trial at law has been had, the relief will not be granted.[7] But two verdicts upon the merits in favor of complainant, one of them being upheld and affirmed, will suffice to warrant the court in entertaining a bill of peace, other suits having been brought and dismissed.[8] And where the right has been satisfactorily established at law, it is held to be quite

[1] Warwick *v.* Norvell, 1 Leigh, 96.

[2] Warwick *v.* Norvell, 1 Rob. Va. 308.

[3] Hodges, *ex parte*, 24 Ark. 197.

[4] Dedman *v.* Chiles, 3 Monr. 426; Woods *v.* Monroe, 17 Mich. 238.

[5] Eldridge *v.* Hill, 2 Johns. Ch. 281; West *v.* Mayor etc., 10 Paige, 539; Dedman *v.* Chiles, 3 Monr. 426; Lapeer etc. *v.* Hart, Harring. Mich. 157; Paterson etc. *v.* Jersey City, 1 Stockt. 434.

[6] Eldridge *v.* Hill, 2 Johns. Ch. 281; West *v.* Mayor etc., 10 Paige, 539; Bath *v.* Sherwin, 1 Prec. Ch. 261; Ewelme Hospital *v.* Andover, 1 Vern. 266; Leighton *v.* Leighton, 1 P. Wms. 671; Trustees etc. *v.* Nicoll, 3 Johns. 566; Tenham *v.* Herbert, 2 Atk. 483.

[7] Eldridge *v.* Hill, 2 Johns. Ch. 281.

[8] Dedman *v.* Chiles, 3 Monr. 426.

immaterial what number of trials have taken place, whether two only, or more.[1] Where there is one general right, common to a number of persons, one person claiming or defending the right against many, or many against one, equity will interfere and determine the right in order to prevent vexatious litigation and multiplicity of suits.[2] Thus, where one is in possession of land, with complete legal title, though not all appearing of record, he may enjoin a number of ejectment suits brought by others against him as to a portion of the premises, since the question is the same as to all of the premises, and may be determined by the chancery proceeding, and thus avoid a multiplicity of suits.[3]

§ 54. A distinction, however, is to be taken between a bill of peace proper, of which equity will entertain jurisdiction, and one whose object is merely to procure a consolidation of the suits, which can be attained as well at law as in equity. Thus, where an injunction was asked to restrain proceedings in ninety-two suits in ejectment, the parties, pleadings, title, and testimony being the same in all the cases, until one or more could be tried, since the object of the bill was merely to obtain a consolidation of the suits, and a court of law was equally competent to give the relief, an injunction was refused.[4] And an injunction is properly dissolved which staid proceedings in sixty-seven suits on county orders brought in one day against the county commissioners, since the defense was at law and should be made there.[5] Nor will a bill of peace be entertained where the right in question is litigated only between two persons, and the decree of a court of equity would affect no others.[6]

§ 55. The beneficial effects of the jurisdiction of equity in

[1] Paterson etc. *v.* Jersey City, 1 Stockt. 434.

[2] Tenham *v.* Herbert, 2 Atk. 483; Woods *v.* Monroe, 17 Mich. 238.

[3] Woods *v.* Monroe, 17 Mich. 238.

[4] Peters *v.* Prevost, 1 Paine's C. C. 64. Whether in such case the injunction would be allowed against the remaining suits after several verdicts, *quære.*

[5] Lapeer etc. *v.* Hart, Harring. Mich. 157.

[6] Eldridge *v.* Hill, 2 Johns. Ch. 281; Tenham *v.* Herbert, 2 Atk. 483; Cowper *v.* Clerk, 3 P. Wms. 157.

restraint of proceedings at law, are nowhere more apparent than in that class of cases where the equities relied upon can not, under the rigid rules of law, be entertained as a defense to the action in the legal forum. Thus, the failure or total want of consideration in negotiable paper, though available as a defense to an action between the original parties, is not admissible where the action is brought against an indorsee in good faith and for valuable consideration, and resort must be had to equity to establish defendant's rights. And where a negotiable instrument or note, without consideration, is valid upon its face, the jurisdiction of equity is well established to interfere and restrain suit upon such instrument. Thus, where a negotiable note, valid upon its face, had been given without any consideration, and upon an agreement that it should be given up to the maker upon the happening of a certain contingency, which had happened, and an action at law was afterward brought upon such note by the payees against the personal representatives of the maker, the suit was enjoined.[1] And this for the reason already noticed, that the illegality of the instrument is not apparent on its face, but is dependent upon evidence *dehors* the instrument itself whereby the defense might fail through lapse of time.[2] And where a note was signed and delivered without consideration, and with the understanding that it should not be enforced, equity will enjoin a suit thereon by the administrators of the payee, since the note can have no more obligatory effect in their hands than it could have had in the hands of their intestate.[3]

§ 56. Upon similar principles equity will restrain suits upon instruments, the consideration for which, though good originally, has since entirely failed, and where great hardship would result from the enforcement of payment. Thus, where the consideration for which a draft was given has entirely failed, a suit thereon may be enjoined, regardless of whether the equities alleged constitute a good defense at law, since the

[1] Metler's Adm'rs. v. Metler, 3 C. E. Green, 270, affirmed on appeal, 4 C. E. Green, 457.

[2] Bromley v. Holland, 5 Ves. 617; Hayward v. Dimsdale, 17 Ves. 111.

[3] Bell v. Gamble, 9 Humph. 117.

draft, being still transferable, might become the foundation for other suits, and the complainant be thereby greatly harassed.[1] So a suit upon a note may be temporarily enjoined, on the ground that the property which was the consideration for the note, has been forfeited to government, by vendor's acts before sale, vendee having brought suit in another jurisdiction to recover the property from the government.[2] It is held, however, that mere unsoundness of the property which constituted the consideration for the note, in the absence of warranty and willful deceit, affords no ground for an injunction.[3] Where one partner sells to the other his interest in the partnership property upon an implied warranty of title, the circumstance of creditors of the firm afterward levying upon and selling the property, is such a failure of consideration as will authorize a court of equity to entertain a bill on behalf of the sureties of the purchaser to enjoin proceedings at law for the purchase money.[4]

II. Suits in Foreign Courts.

§ 57. The English rule; foreign courts not enjoined, but only the parties.
58. Illustrations of the rule.
59. Court may enjoin parties within its jurisdiction, though the property is abroad; English rule.
60. American rule.
61. Rule as between state and United States Courts.

§ 57. The jurisdiction of courts of equity to restrain proceedings in the courts of a foreign country, has been the subject of much contention, resulting in not a little conflict of authority. The jurisdiction of the English Court of Chancery to thus interfere with the proceedings of foreign courts, though formerly questioned, may now be regarded as definitely settled and clearly established. In the exercise of this jurisdiction

[1] Ferguson v. Fisk, 28 Conn. 501.
[2] Carswell v. Macon, etc., 38 Geo. 403.
[3] Johnson v. Andrews, 28 Geo. 17.
[4] Hough v. Chaffin, 4 Sneed, 238.

the court does not assume to control or interfere with the courts of the foreign country, since any such assumed control would be manifestly inconsistent with the plainest principles of national sovereignty and equality. It rather proceeds upon the undoubted authority which it possesses over persons within its territorial limits and under its jurisdiction, to restrain them from using the tribunals of a foreign state in such manner as is contrary to equity and good conscience. When, therefore, the parties to a suit in a foreign country reside within the jurisdiction of the English Court of Chancery, it may, in a proper case, act *in personam* upon these parties, and prohibit them from proceeding further with the suit. The proceedings are regarded as purely *in personam*, the mandate of the court being directed to the parties and not to the tribunal in which the action is pending.[1]

[1] Cranstown *v.* Johnston, 3 Ves. 182; 5 Ves. 277; Bunbury *v.* Bunbury, 3 Jur. 648; Carron etc. *v.* Maclaren, 5 H. L. Cases, 416; Beckford *v.* Kemble, 1 Sim. & Stu. 7; Harrison *v.* Gurney, 2 Jac. & W. 563; Bowles *v.* Orr, 1 Y. & C. 464; Portarlington *v.* Soulby, 3 Myl. & K. 104. In the latter case the history of the jurisdiction, as well as the principles upon which it is based, are very clearly laid down by Lord Chancellor Brougham, as follows: "Soon after the Restoration, and when this, like every other branch of the court's jurisdiction, was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of chancellors, the Nottinghams and Macclesfields, the parents of equity, the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported shortly in Freeman's Reports, and somewhat more fully in Chancery Cases, under the name of Lowe *v.* Baker, 2 Freem. 125; 1 Ch. Cas. 67. In Lowe *v.* Baker it appears that one only of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction there, and the court allowed the *subpœna* to be served on him, and that this should be good service on the rest. So far, there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain these proceedings at Leghorn, after advising with the other judges. But the report adds: '*Sed quære*, for all the bar was of another opinion;' and it is said that, when the argument against issuing it was used, that this court had no authority to bind a foreign court, the answer was given that the injunction was not directed to the foreign court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a court within this country, which no order of this court ever affects to bind, our orders being only pointed at the parties, to restrain them from proceeding. Accordingly, this case of Lowe *v.* Baker, has not been recog-

§ 58. In accordance with these principles the indorsee of a bill of exchange has been restrained in England from bringing suit upon the bill of exchange in the courts of Ireland upon grounds which would have warranted the relief against such suit in the English courts.[1] So a creditor who had availed himself of a decree in England to procure relief against the assets of an estate there, was enjoined from proceeding with a suit against the same estate in Ireland.[2]

§ 59. The fact that the property which is the subject matter of the controversy is located in a foreign country will not

nized or followed in later times. Two instances are mentioned in Mr. Hargrave's collection, of the jurisdiction being recognized; and in the case of Wharton *v.* May, 5 Ves. 71; see, also, Kennedy *v.* Earl of Cassiblis, 2 Swanst. 313; Bushby *v.* Munday, 5 Madd. R. 297; Harrison *v.* Gurney, 2 J. & W. 563. In Beauchamp *v.* Marquis of Huntley, Jac. 546, which underwent so much discussion, part of the decree was to restrain the defendants from entering up any judgment, or carrying on any action in what is called the Court of Great Session in Scotland; meaning, of course, the Court of Session. I have directed a search to be made for precedents, in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is the case of Campbell *v.* Houlditch, in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the Court of Session in Scotland. From the note, which his Lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority. In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party, on whom this order is made, being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if, for instance, as in Penn *v.* Lord Baltimore, 1 Ves. Sen. 444, it can decree the performance of an agreement touching the boundary of a province in North America; or, as in the case of Tellor *v.* Carteret, 2 Vern. 449, can foreclose a mortgage in the Isle of Sark, one of the channel islands; in precisely the like manner it can restrain the party being within the limits of its jurisdiction, from doing anything abroad, whether the thing forbidden be a conveyance or other act, *in pais*, or the instituting, or prosecution of an action in a foreign court."

[1] Portarlington *v.* Soulby, 3 Myl. & K. 104.

[2] Beauchamp *v.* Huntley, Jac. 546.

prevent the court from exercising the jurisdiction where all the parties to the transaction are within its reach and amenable to its process. And if it be made to appear that the matters in controversy can be more expeditiously adjusted and the ends of justice better attained in the jurisdiction where the parties then are, proceedings in the courts of the foreign country will be enjoined.[1] And where parties have proceeded in equity as far as a decree, and pending the settlement of accounts thereander by a master in chancery proceedings are instituted in respect to the same matter in another country, an injunction may be allowed.[2] So where all the parties are within the jurisdiction of the court of equity, and it has on a bill to redeem under a mortgage decreed an inquiry as to the amount due, it may restrain proceedings for the foreclosure of the mortgage in the courts of another country on such terms as it thinks proper.[3] If, however, upon balancing the convenience and inconvenience likely to result to the different parties, it appears that the questions involved can be more conveniently litigated in the foreign court an injunction will be refused.[4]

§ 60. While in this country the aid of equity is rarely, if ever, invoked to restrain proceedings in the courts of foreign nations, yet the same principles are held applicable to the case of enjoining citizens of one state from proceedings at law in the courts of a sister state. And while there is a lack of uniformity, amounting even to a conflict of authority, in the decided cases, the English rule seems to have the support of the clear weight of authority, and the courts of one state will, in a proper case, enjoin persons within their jurisdiction from instituting legal proceedings in other states.[5] As we have

[1] Bunbury *v.* Bunbury, 1 Beav. 320; Beckford *v.* Kemble, 1 Sim. & Stu. 7.

[2] Wedderburn *v.* Wedderburn, 2 Beav. 208.

[3] Beckford *v.* Kemble, 1 Sim. & Stu. 7.

[4] Jones *v.* Geddes, 1 Ph. 724.

[5] Dehon *v.* Foster, 4 Allen, 545; Bank etc. *v.* Rutland, 28 Vt. 470; Hays *v.* Ward, 4 Johns. Ch. 123; Vail *v.* Knapp, 49 Barb. 299. And see, upon the general subject of the powers of equity to control the action of persons within its jurisdiction, with reference to matters beyond its jurisdiction, Mitchell *v.* Bunch, 2 Paige, 606; Massie *v.* Watts, 6 Cranch, 148. But see, *contra*, Burgess *v.* Smith, 2 Barb. Ch. R. 276; Williams *v.* Ayrault, 31 Barb.

seen in the preceding section, a distinction is drawn between a court of equity interfering with the action of the courts of a foreign state, and restraining persons within its own jurisdiction from using foreign tribunals as instruments of wrong and oppression. While, therefore, the court will assume no control over the course of the proceedings in the foreign tribunal, it may and will interfere to prevent those who are amenable to its own process from instituting suits in other states which will result in injury and fraud.[1]

364; Carroll *v.* Farmers etc., Harring. Mich. 197. Even the courts of New York, which have contended most strenuously against the rule, are by no means inflexible in denying the relief, and the injunction was allowed in Hays *v.* Ward, 4 Johns. Ch. 123, and in Vail *v.* Knapp, 49 Barb. 299, *supra*. And in Mead *v.* Merritt, 2 Paige, 402, the jurisdiction of equity is recognized to restrain citizens of one state from beginning suits in a sister state, though denied as to suits already begun. The strongest reason which can be urged against the exercise of this jurisdiction is that assigned in denying the injunction in Carroll *v.* Farmers etc., Harring. Mich. 197, that if courts of one state should see fit to enjoin proceedings in another, that other might retaliate in like manner by enjoining proceedings in the first, and thus give rise to an endless conflict of jurisdiction. Even this reasoning looses its force when it is remembered that the injunction is not directed to the court of the foreign state, but simply to the parties litigant, the proceeding being purely *in personam*.

[1] Dehon *v.* Foster, 4 Allen, 545; Vail *v.* Knapp, 49 Barb. 299; Great Falls etc. *v.* Worster, 23 N. H. 470. In this case Gilchrist, C. J., says: "It would be a great defect in the administration of the law, if the mere fact that the property was out of the state, could deprive the court of the power to act. As much injustice may be perpetrated in a given case, against the citizens of this state, by going out of the jurisdiction and committing a wrong, as by staying here and doing it, * * as the legislature has conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here, has been recognized for nearly two hundred years, we have no hesitation in holding that the court has jurisdiction." In a leading American case upon this subject the court says: "The authority of this court, as a court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the courts of this state and of other states, or foreign countries, is clear and indisputable. In the exercise of this power, courts of equity proceed, not upon any claim of right to interfere with or control the course of proceedings in other tribunals, * * the jurisdiction is founded

§ 61. An exception to the rule as laid down in the preceding section, is recognized as between the state and federal courts in this country, growing out of the peculiar structure of our judicial system. And, in general, the courts of the United States will not interfere by injunction to restrain proceedings in the state courts.[1] It is held, however, that the United States courts may restrain a state officer from such proceedings under a statute of a state as would destroy a franchise granted by the United States.[2] So, in a proper case, they may enjoin proceedings in their own forum until the determination of the same subject matter in a suit between the parties in the state

on the clear authority vested in courts of equity over persons within the limits of their jurisdiction, and amenable to process, to restrain them from doing acts which will work wrong and injury to others. * * As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign state or country. If the case stated in the bill is such as to render it the duty of the court to restrain a party from instituting and carrying on proceedings in a court in this state, it is bound in like manner to enjoin him from prosecuting a suit in a foreign court." Per Bigelow, C. J., Dehon *v.* Foster, 4 Allen, 545. In Vail *v.* Knapp, 49 Barb. 299, it is said: "While, as a general rule, the propriety of which is apparent, the courts of this state decline to interfere by injunction, to restrain its citizens from proceeding in an action which has been commenced in the court of a sister state, yet there are exceptions to this rule, and when a case is presented, fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud. No rule of comity forbids it. * * * In granting the injunction we deal with parties residing in this state, and do not seek to interfere with or attempt to control the action of the court in Vermont, in which the action is pending. We command our own citizens, not the courts or parties residing in Vermont."

[1] Diggs *v.* Wolcott, 4 Cranch, 179. And by act of Congress approved March 2, 1793, it is provided, Chap. XXII. Sec. 5, as follows: * * "Nor shall a writ of injunction be granted to stay proceedings in any court of a state; nor shall such writ be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same." 1 Stat. at Large, 335. But the United States courts will, in a proper case, grant an injunction in aid of proceedings in bankruptcy, to restrain proceedings at law in the state courts against the property of a bankrupt. For the principles governing in such cases, see Chapter IV., *post.*

[2] Osborn *v.* United States Bank, 9 Wheat. 738.

courts.[1] Upon the same principles of comity which forbid the federal courts interfering with state tribunals, the courts of a state decline to interfere with, or restrain, proceedings in the courts of the United States.[2] Indeed, aside from reasons of comity, the state courts are entirely destitute of authority for such interference.[3]

III. Suits Pertaining to Real Estate.

§ 62. Ejectment.
63. Action at law will not be enjoined where court of law has jurisdiction of the case.
64. Further illustrations of the rule.
65. Forcible entry and detainer.
66. Failure of consideration; foreclosure.
67. Further illustrations.
68. Further illustrations.

§ 62. The aid of equity by injunction is frequently invoked for the purpose of restraining actions at law pertaining to real estate, especially actions of ejectment. As we have already seen, an injunction will be allowed to restrain a number of suits in ejectment against the same persons where the questions involved are identical, upon the ground of preventing multiplicity of suits.[4] Where, however, the object of the

[1] City Bank v. Skelton, 2 Blatch. 14; S. C. Ib. 26.

[2] Schuyler v. Pelissier, 3 Ed. Ch. 191; Coster v. Griswold, 4 Ed. Ch. 364.

[3] Phelan v. Smith, 8 Cal. 520; Riggs v. Johnson Co., 6 Wal. 166. And in a recent case it is said that "Orders for an injunction, issued by state courts, are as inoperative upon the process of the Circuit Court (of the U. S.) of that district, as they would be if directed to the process of a circuit court in any other district of the United States, because the state and federal courts, in their sphere of action, are independent of any such control." Per Clifford, J., United States v. Keokuk, 6 Wal. 514. But see, *contra*, Akerly v. Vilas, 15 Wis. 401, where it is held that if complainant has begun his equitable action in the state court, and afterward begins an action at law upon the same subject matter in the United States court, defendant having a whole or partial defense, but of which he can not avail himself in the action at law, the proceedings in the federal court may be enjoined.

[4] Woods v. Monroe, 17 Mich, 238.

bill is not so much to prevent vexatious litigation and a multiplicity of suits, as to procure a consolidation of the actions, equity will not interfere, since a court of law is equally competent to administer the relief desired.[1] But an action of ejectment may be enjoined on the ground that plaintiff is in equity and conscience estopped from making a claim to recover the premises, as where his conduct had been such as to warrant defendant in going on with the erection of works upon the land.[2] So ejectment against a corporation will be enjoined where plaintiff in the suit acted for the corporation in purchasing the land, though taking the title in his own name, since, under the principles pertaining to implied trusts, he is regarded in equity as a trustee for the company.[3] But where equities are equal the court will not interfere by injunction, as where one has purchased real estate, giving a bond for the purchase money, he will not be allowed to restrain an innocent purchaser in good faith and without knowledge of complainants' equities, but the parties will be left to their remedy at law.[4]

§ 63. Equity will not retain an injunction restraining an action of ejectment where it is apparent that complainants have a good defense to such action at law, and that the deed on which plaintiff relies is void.[5] And a preliminary injunction restraining proceedings in ejectment will be dissolved as to that portion of the property the title to which can be properly determined in the legal forum.[6] And it may be laid down as a general rule that equity will not restrain a person from the assertion of title to real estate, unless the case be entirely free from doubt. So where the title is being tested by an action of ejectment in a court of common law having jurisdiction, the suit will not be enjoined, since the interference in such a case would be repugnant to the clearly established principle that, where different courts

[1] Peters v. Prevost, 1 Paine C. C. 64.
[2] Trenton etc. v. McKelway, 4 Halst. Ch. 84.
[3] Id.
[4] McFarlane v. Griffith, 4 Wash. C. C. 585.
[5] Morris etc. v. Jersey City, 1 Boas. 227.
[6] Camden etc. v. Stewart, 3 C. E. Green, 489.

have concurrent jurisdiction, the right to determine the controversy belongs to that tribunal to which resort is first had.[1] So an action of ejectment will not be restrained if brought by the owner of land after attaining majority, who, while an infant, had contracted for its sale and given a bond for conveyance, and after coming of age refuses to ratify the sale, even though the purchase money has been paid.[2] And the relief will not be granted on the ground that the action is barred by the statute of limitations, where the suit is brought by an administrator to recover land for the benefit of heirs who are not in a condition to sue, one of them being *non compos* and the other a *feme covert.*[3] But where an injunction has been allowed against the prosecution of an action of ejectment upon the ground that the transaction out of which plaintiff derives title was a mortgage, from which defendant in ejectment seeks to redeem, if the right of redemption is established the injunction should be made perpetual, and it is error if the court does not so direct.[4]

§ 64. The owner in fee of real estate may be allowed to enjoin the prosecution of an action of ejectment by a claimant under a sheriff's deed which vests an apparently perfect title in the grantee, but whose only effect would be to cast a cloud upon the title.[5] But the mere staleness of a pretended claim of title, or the fact that it is barred by the statute of limitations, constitutes no sufficient ground for restraining proceedings in ejectment, since such ground may be relied upon in defense of the action at law.[6] And where complainant has tortiously obtained possession of premises, pending an action to establish his equitable title thereto, he will not be allowed to enjoin proceedings for the recovery of the possession.[7]

§ 65. An injunction will not be allowed against an action of forcible entry and detainer where it does not appear that a

[1] Stockton *v.* Williams, 1 Doug. Mich. 546.
[2] Brawner *v.* Franklin, 4 Gill. 463.
[3] Fleming *v.* Collins, 27 Geo. 494.
[4] Harbison *v.* Houghton, 41 Ill. 522.
[5] Sieman *v.* Austin, 33 Barb. 9.
[6] Horner *v.* Jobs, 2 Beas. 19.
[7] *Ex parte* Clarke, 1 Russ. and M. 563.

certain and manifest irreparable injury would follow the withholding of the relief. The rule rests upon the well-established principle that he who invokes the aid of equity must come into court with clean hands, and in point of law one who is liable for an action of forcible entry and detainer has a taint of wrong about him, and is not, as a matter of right, entitled to the interference of a court of chancery.[1] Nor will the relief be granted in the absence of any allegation of fraud, mistake, accident or surprise.[2]

§ 66. A suit at law upon a bond for the conveyance of real estate has been enjoined where it appeared that vendor had no title at the time of making the agreement to convey; in such case equity treats the contract as an unexecuted one until vendee receives that for which he has contracted.[3] And a mortgagor who has paid his mortgage, and afterward conveyed with covenants of warranty to a third person, may properly enjoin a suit by the mortgagee who attempts to foreclose the mortgage, without waiting until suit upon his covenants of warranty to interpose his defense.[4]

§ 67. A suit brought by the heirs at law to recover possession of premises, will not be enjoined at the instance of a devisee under a lost will which has been insufficiently proven, the proper remedy being for complainant to retrace his steps and correct his errors in the probate court where they were made.[5] And where an injunction is sought against an action at law on the ground of confusion of boundaries, complainant must allege the fact of such confusion in his bill, and set forth the circumstances producing it.[6]

[1] Crawford v. Paine, 19 Iowa, 172; Lamb v. Drew, 20 Iowa, 15.

[2] Lamb v. Drew, 20 Iowa, 15.

[3] Dorsey v. Hobbs, 10 Md. 412. Though this case goes to the full extent of the principle announced in the text, yet it may well be questioned whether the rule is consistent with the established principle of refusing relief in equity where ample redress can be had at law; since the want of consideration, resulting from want of title, could just as efficiently be urged in defense of the action at law as in a bill in equity.

[4] Hubbard v. Jasinski, 46 Ill. 160.

[5] Clarke v. Clarke, 7 R. I. 45.

[6] Foster, *ex parte*, 11 Ark. 304.

§ 68. A bill to establish a legal title and to restrain proceedings at law, will not be entertained, no equitable circumstances appearing in the case and nothing that prevents a full defense at law, complainant not even alleging that he is unable to defend at law.[1] Nor will an injunction be allowed against proceedings at law by a lessor to recover possession of his property demised to a lessee under a lease from year to year, on the ground that complainant has made valuable improvements which would be lost to him in case he were dispossessed of the property.[2]

IV. Special Cases.

§ 69. Usury.
70. Attachment.
71. Awards.
72. Change of venue; absence of witness; statute of limitations.
73. Landlord and tenant.
74. Cross demands and set-off.
75. Sale of personal property without title.
76. United States revenue laws.
77. Trusts; notes.
78. Granting injunctions an original and not an appellate jurisdiction.
79. Effect of the writ in certain cases.
80. Proceedings against debtors.
81. Equity will enjoin dismissal of suit; lost instrument.
82. Statutory relief a bar to an injunction.
83. Dissolution.

§ 69. Where relief by injunction is sought against proceedings at law upon usurious contracts, the courts enforce a strict observance of the principle that he who would have equity must do equity. And unless the person aggrieved first pays or offers to pay the amount lawfully due upon the contract, he will not be permitted to enjoin proceedings at law.[3] And it is held that the amount due must be actually tendered

[1] DeGroot v. Receivers etc., 2 Green Ch. 198.

[2] West v. Flannagan, 4 Md. 36.

[3] Rogers v. Rathbun, 1 Johns. Ch. 367; Tupper v. Powell, Ib. 439; Fanning v. Dunham, 5 Johns. Ch. 122; Morgan v. Schermerhorn, 1 Paige, 544; Miller v. Ford, Saxt. 358.

or produced in court with lawful interest.[1] If, however, defendant answers without taking advantage of this objection, an injunction already granted will not be dissolved where complainant offers to pay the amount due.[2]

§ 70. An injunction is the proper remedy for the protection of creditors in a foreign attachment, who are entitled to a priority of claim over creditors subsequently attaching.[3] But a suit in attachment will not be restrained on the ground that the amount claimed is so large that defendant, being a non-resident, can not obtain the necessary security to dissolve the attachment, and that his inability to procure such security will deprive him of the privilege of introducing a defense of set-off.[4]

§ 71. Equity will enjoin an action at law upon an award of arbitrators on the ground of improper conduct on the part of the arbitrators in making the award. Thus, where they had received evidence from a witness on one side of which the other party was not apprised or notified, and to which he had no opportunity of replying, the proceedings were enjoined, even though the arbitrators positively disclaimed being influenced by such *ex parte* evidence.[5] But an action upon an award will not be enjoined merely to give one who has gone voluntarily to trial an opportunity to secure the impeachment of witnesses, when he had been apprised beforehand of the nature of their evidence.[6] Nor will the relief be allowed where the person aggrieved has been guilty of laches in applying for the injunction, or where his conduct has been such as to estop him from relief in equity.[7]

§ 72. Proceedings at law may be enjoined and a change of venue had where the facts relied upon have come to the knowledge of complainant too late to apply for a change of venue

[1] Rogers *v.* Rathbun, 1 Johns. Ch. 367; Tupper *v.* Powell, Ib. 439.
[2] Morgan *v.* Schermerhorn, 1 Paige, 544.
[3] Erskine *v.* Staley, 12 Leigh. 406; Moore *v.* Holt, 10 Grat. 284.
[4] Dungan *v.* Miller, 4 C. E. Green, 218.
[5] Cliland *v.* Hedly, 5 R. I. 163.
[6] Woodworth *v.* Van Buskerk, 1 Johns. Ch. 432.
[7] Jones *v.* Bennett, 1 Bro. P. C. 528; Smith *v.* Whitmore, 1 H. and M. 576.

at law.[1] But the relief will not be granted because of the refusal of the court to postpone the trial on account of the absence of a material witness, since that is a matter entirely within the discretion of the court of law, with the exercise of which discretion equity will not interfere.[2] Nor will an injunction be allowed to restrain defendant from pleading the statute of limitations, except in a plain case of fraudulent abuse of the lapse of time. And in the absence of such fraud and of any contract or stipulation that delay in bringing suit should not prejudice the rights of the parties, an injunction will be refused.[3]

§ 73. As between landlord and tenant it is held that the destruction of the demised premises by fire does not afford sufficient ground to warrant a court of equity in restraining proceedings at law for the recovery of the rent, the lease containing no provision for a suspension of rent in case of fire.[4]

§ 74. While the existence of cross demands is not of itself sufficient to constitute an equitable set-off,[5] yet where the cross demands between the parties are of such a nature that if both were recoverable at law the one might be set off against the other, a court of equity may, if it has jurisdiction of the subject matter, enforce the set-off by enjoining proceedings at law.[6]

§ 75. One who has purchased personal property at a sale under execution, which is afterward proved to belong to a person other than the judgment debtor, who recovers it by due course of law, is not entitled to an injunction to restrain proceedings upon his bond given for the purchase money.[7]

§ 76. Courts of equity will rarely interfere with the legal rights of the United States government under the revenue laws, and if injustice is done under their provisions as to

[1] Darmsdatt *v.* Wolfe, 4 Hen. and M. 246.
[2] Hamilton *v.* Dobbs, 4 C. E. Green, 227.
[3] Bank etc. *v.* Hill, 10 Humph. 176.
[4] Leeds *v.* Cheetham, 1 Sim. 146.
[5] Rawson *v.* Samuel, 1 Cr. and Ph. 161.
[6] Clark *v.* Cort, 1 Cr. and Ph. 154.
[7] McGhee *v.* Ellis, 4 Lit. 244; Fawcet *v.* Pendleton, 5 Lit. 186.

penalties and forfeitures, relief must be had by application to the treasury department, and not by injunction in equity.[1]

§ 77. Where the relief is sought on the ground that the subject matter of the suit, being a trust, is within the jurisdiction of equity, the proceedings at law should not be enjoined, but only execution upon the judgment which may be recovered.[2] But a suit upon a note will not be enjoined, for the protection of other creditors of the maker, on the ground that he was insolvent at the time when legal proceedings were instituted, since the mere fact of such insolvency does not invalidate or render fraudulent a note given for a *bona fide* indebtedness.[3]

§ 78. The granting of injunctions being an exercise of original and not of appellate jurisdiction, a court of last resort whose jurisdiction is limited by the state constitution, will not be allowed to enlarge or extend its jurisdiction to the granting of injunctions in cases pending in the inferior courts where this power is not granted it by the constitution.[4]

§ 79. The effect of an injunction staying proceedings at law against the principal, where special bail has been taken, is to tie up the hands of plaintiff in the action at law so that no

[1] Powell *v.* Redfield, 4 Blatch. 45.

[2] Justice *v.* Scott, 4 Ired. Eq. 108.

[3] Savage *v.* Ball, 2 C. E. Green, 142.

[4] Merrill *v.* Lake, 16 Ohio, 373; Kent *v.* Mahaffy, 2 Ohio St. 498. In the latter case, Thurman, J., pronouncing the opinion of the court, says: "That we can allow an injunction in a case pending in this court upon an appeal, is very clear. An injunction may be the very object of the suit —the final decree sought—and so a provisional injunction, during the pendency of the suit, may be necessary for the purposes of justice. The power to allow these is a part of the appellate jurisdiction, the grant of which is authorized by the constitution, and has been made by the law. But to allow an injunction in a case pending in another court, would be an exercise of original, and not of appellate jurisdiction. Now the original jurisdiction conferred upon this court by the constitution, is limited to *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*. Art. 4, Sec. 2. * * * it would be wholly inconsistent with, and in a great measure destructive of, the judicial system it ordains, to suppose that this original jurisdiction can be enlarged by law. It is true there is no express prohibition against it, but none was necessary."

proceedings can be had against the special bail.[1] And where the action enjoined was at issue and ready for trial, when the injunction issued out of chancery restraining proceedings, plaintiff in the action at law will not be allowed to proceed to trial and judgment on the ground of saving of time and expense.[2]

§ 80. A suit for the collection of a debt will not be restrained because the plaintiff has accepted of his debtor certain goods, with the understanding that they were in satisfaction of the debt, if not taken from him by superior liens, unless the debtor seeking the injunction can show that there were no superior liens outstanding.[3] Nor will an injunction be granted to restrain proceedings at law to recover damages against one who has fraudulently obtained a decree in chancery which has been set aside on account of such fraud.[4] But it is held that equity has jurisdiction to enjoin proceedings against the person and equitable assets of a debtor, under a statute abolishing imprisonment for debt, and providing for the punishment of fraudulent debtors.[5]

§ 81. Equity will, in a proper case, interfere to prevent the dismissal of an action at law. Thus, where defendant in the injunction suit has, upon good consideration, given complainant a power of attorney to bring an action at law in his own name, but for complainant's benefit, the dismissal of the suit by the nominal plaintiff will be enjoined.[6] But an injunction against a suit at law, the only equity in favor of which is a written agreement alleged to be lost, will not be retained where the bill does not state that proof of the contents of the lost agreement can be given by parol, the answer denying all knowledge of such agreement, and stating facts inconsistent therewith.[7]

[1] Webster *v.* Chew etc., 3 Har. & McHen. 123.
[2] Hutchinson *v.* Hutchinson's Ex'rs., 1 Houst. 618.
[3] Camp *v.* Matheson, 29 Geo. 351.
[4] Peck *v.* Woodbridge, 3 Day, 508.
[5] Frost *v.* Myrick, 1 Barb. 362.
[6] Monroe *v.* McIntyre, 6 Ired. Eq. 65.
[7] Kent *v.* De Baun, 1 Beas. 220.

§ 82. The existence of statutory relief for the injury complained of is of itself sufficient cause for refusing an injunction. Thus, a sheriff will not be allowed to restrain suits brought against him for having, in his official capacity, sold property on execution to which there are conflicting rights, when he is by statute provided with ample remedy at law, and is not bound to act unless indemnified.[1]

§ 83. Upon the dissolution of an injunction to a suit at law, the court, as a court of chancery, has nothing farther to do with the case, but should leave the parties to proceed at law with the suit enjoined.[2] And it is error for the same court which has dissolved the injunction, sitting as a court of equity, to immediately enter up judgment in the action, sitting as a court of law.[3]

[1] Storrs v. Payne, 4 Hen. & M. 506.
[2] Powers v Waters, 8 Mo. 299.
[3] Id.

CHAPTER III.

OF INJUNCTIONS TO RESTRAIN PROCEEDINGS AT LAW AFTER JUDGMENT.

I. General Features of the Relief.
II. Cases where Defense should have been made at Law
III. Of Judgments Obtained through Fraud.
IV. Of Accident, Mistake, Ignorance, and Surprise.
V. Of Irregular, Erroneous and Void Judgments.
VI. Of Judgments upon Usurious Contracts.
VII. Of Judgments upon Gaming Contracts.
VIII. Of Set-off.
IX. Of Judgments as Affecting Title.
X. Of the Court in which the Judgment was Rendered.
XI. Of Injunctions against Awards.
XII. Of Judgments by Default and Confession.
XIII. Special Cases.

I. General Features of the Relief.

§ 84. History of the jurisdiction.
85. Not a favorite jurisdiction with courts of equity.
86. Judgment must be against conscience before equity will enjoin.
87. After-discovered evidence ground for relief.
88. Defective jurisdiction no ground for injunction.
89. Judgment must be unjust and oppressive.
90. Effect of injunction upon judgment lien.
91. Release of errors.
92. Effect of statutes requiring release of errors.
93. Payment of amount due must be tendered.
94. Only judgment creditors can restrain disposition of their debtors' property on execution.
95. Of the bill and parties thereto.
96. Equity will not retry issues; writ of error no bar to injunction.

§ 84. The jurisdiction of equity to stay proceedings at law after judgment recovered is of ancient origin, and though now

established beyond dispute, it was formerly the cause of frequent and violent contests between the chancellors and common law judges. It was insisted by the latter that after verdict equity was powerless to enjoin the proceedings, and that the Court of King's Bench would not permit a judgment creditor to be enjoined from following up his judgment at law. The jurisdiction may be distinctly traced back to the beginning of the reign of Edward the Fourth, and its assertion constituted one of the articles of impeachment against Cardinal Wolsey during the reign of Henry the Eighth. It was not definitely established, however, until the reign of James the First, when a violent contest arose between Lord Ellesmere, who then held the Great Seal, in favor of the jurisdiction, and Lord Chief Justice Coke against it. A reference was had to five of the most eminent lawyers of that time, who reported a series of precedents in favor of the right to interfere and that there were cases of its exercise even after execution. The report being confirmed by the King, an end was had to the discussions that had so long prevailed, and the jurisdiction has never since been questioned.[1]

§ 85. The jurisdiction, though well established, is not regarded as a favorite one with courts of equity. A bill seeking relief of this nature is watched with extreme jealousy and the grounds upon which the interference will be allowed are confessedly somewhat narrow and restricted. It will not suffice to show that injustice has been done by the judgment against which relief is sought, but it must also appear that this result was not caused by any inattention or negligence on the part of the person aggrieved, and he must show a clear case of diligence to entitle himself to an injunction.[2] The

[1] 1 Woodes. Lect. 6, p. 186; 3 Ib. 56, p. 398; 1 Spence's Eq. Jur. p. 674; 1 Hallam's Const. Hist. 472.

[2] Robuck v. Harkins, 38 Geo. 174; Slack v. Wood, 9 Grat. 40; Bateman v. Willoe, 1 Sch. & Lef. 204. The general principle upon which the relief is founded is well stated by Lord Redesdale in Bateman v. Willoe, as follows: "It is not sufficient to shew that injustice has been done, but that it has been done under circumstances which authorize the court to interfere. Because if a matter has been already investigated in a court of justice, according to the common and ordinary rules of investigation, a court of

object of the injunction is to prevent the person against whom it issues from availing himself of an unfair advantage, resulting from fraud, accident, mistake, or otherwise, the enforcement of which is against conscience.[1]

§ 86. The general principle underlying the jurisdiction is that it must be against conscience to execute the judgment sought to be enjoined. And it must clearly appear that the person aggrieved could not avail himself at law of the equities relied upon to enjoin the judgment, or, if he was in a position to avail himself of such equities in defense of the action at law, that he was prevented from so doing by accident, mistake or surprise, or by fraud of the adverse party unmixed with laches or negligence of his own.[2] In accordance with this principle a judgment will not be enjoined where there is no evidence of a good defense to the merits, or that the judgment is contrary to equity and against conscience, the only ground relied upon being that the cause was brought on to trial in violation of a verbal agreement of counsel for its postponement.[3] And where

equity can not take on itself to enter into it again. * * * The inattention of parties, in a court of law, can scarcely be made a subject for the interference of a court of equity. There may be cases cognizable at law, and also in equity, and of which cognizance can not be effectually taken at law; and, therefore, equity does sometimes interfere, as in cases of complicated accounts, where the party has not made defense, because it was impossible for him to do it effectually at law; so, where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using. But without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has been already discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction."

[1] Little *v.* Price, 1 Md. Ch. 182.

[2] Wingate *v.* Haywood, 40 N. H. 437; Wierich *v.* De Zoya, 2 Gilm. 385; Wright *v.* Eaton, 7 Wis. 595; Ableman *v.* Roth, 12 Wis. 81; Little *v.* Price, 1 Md. Ch. 182; Slack *v.* Wood, 9 Grat. 40; Marine etc. *v.* Hodgson, 7 Cranch, 332; Dugan *v.* Cureton, 1 Ark. 31; Andrews *v.* Fenter, Ib. 186; Watson *v.* Palmer, 5 Ark. 501; Conway *v.* Ellison, 14 Ark. 360; Bently *v.* Dillard, 6 Ark. 79; Hempstead *v.* Watkins, Ib. 317; Menifee's Adm'rs. *v.* Ball, 7 Ark. 520.

[3] Ableman *v.* Roth, 12 Wis. 81. In this case the ground relied upon in support of the injunction to the judgment at law was that it was obtained

complainant fails to show due diligence in availing himself of his defense at law, an injunction already granted may be dissolved, even though no answer is yet filed, it having been improperly awarded in the first instance.[1] And unless required so to do by motives of public policy the court never will against equity and conscience, arrest the progress of proceedings at law.[2]

§ 87. The discovery, after the final decision of a cause, of new evidence tending to establish the same defense relied upon on the trial of the action will not, of itself, authorize an injunction against the judgment.[3] Where, however, facts material to establish the defense have been discovered since the trial, which the defendant could not sooner have discovered by the use of ordinary diligence, or where they have been fraudulently concealed, the relief may be allowed.[4] So if the after-discovered evidence shows a mistake or miscalculation on the part of the jury, such as, if discovered in time, would have furnished good ground for a new trial, the judgment will be

through trickery of plaintiff's attorneys in forcing the case to trial in violation of a verbal agreement to the contrary. There was no evidence offered of a good defense at law upon the merits. Dixon, C. J., says: "Upon the second reason we say, that all courts and writers agree, that equity interferes to stay proceedings at law, only to prevent injustice by the unfair use of the process of the courts in which proceedings are pending. The fundamental and governing principle is, that it is against conscience to permit the party enjoined to proceed. In case of a judgment it must be shown to be against conscience to allow it to be executed; otherwise the powers of the court will not be called into exercise. In addition to this, the injured party must show, either that he could not have availed himself of the facts which make it unjust, in the court of law, or that he was prevented from so doing by fraud, accident or mistake, without negligence on the part of himself or his agents (2 Story's Eq. Jur. § 887, and cases there cited). Courts of equity will not interfere to grant a new trial, where no substantial right has been lost, and no unfair advantage gained, simply because, by some trick or artifice, a judgment, which is just and equitable in itself, has been obtained in advance of the time when it would otherwise have been rendered."

[1] Slack v. Wood, 9 Grat. 40.

[2] Craig v. Ankeney, 4 Gill, 225.

[3] Campbell v. Briggs, 3 Rob. La. 110; Ware v. Horwood, 14 Ves. 31.

[4] Baltzell v. Randolph, 9 Fla. 366; Bateman v. Willoe, 1 Sch. & Lef. 204; Gainsborough v. Gifford, 2 P. Wms. 424.

restrained.[1] And where the defense relied upon was fraud as to some of the debts out of which the action grew, but the fraud was not established, the defendant is entitled to an injunction restraining the judgment on the ground of after-discovered evidence establishing fraud as to some of the debts, but not questioning others.[2]

§ 88. The purpose for which the interference is allowed being to prevent injustice, a defect in jurisdiction in the court in which the judgment was rendered will not, of itself, authorize an injunction if no equitable reason is shown why the judgment should not be enforced.[3] Even if the judgment is altogether void for want of jurisdiction, equity will not enjoin, but will leave the parties to their remedy at law by *certiorari*.[4]

§ 89. A judgment, regular on its face, will not be enjoined when it is not shown to be unjust or oppressive, and when it does not appear that the person asking the aid of equity against the enforcement of the judgment has a good defense to the claim upon which it was founded.[5] The rule has been carried even further and it has been held that it must clearly appear that plaintiff in the action at law had in fact no cause of action. This being shown to the satisfaction of a court of equity, the judgment will be enjoined if there has been no laches on the part of complainant.[6] But if the judgment, as between the parties thereto, has been fairly obtained, it will not be restrained on the ground of mere hardship to others.[7]

§ 90. As regards the effect of the injunction upon the lien of the judgment enjoined, it is to be remembered that it operates only *in personam* upon the judgment creditor and not upon the judgment itself; the lien is therefore not divested or suspended, but only the execution stayed.[8] But an injunc-

[1] Rust *v.* Ware, 6 Grat. 50.
[2] Billups *v.* Sears, 5 Grat. 31.
[3] Stokes *v.* Knarr, 11 Wis. 389; Crandall *v.* Bacon, 20 Wis. 639.
[4] Crandall *v.* Bacon, 20 Wis. 639.
[5] Taggart *v.* Wood, 20 Iowa, 236.
[6] Huebschman *v.* Baker, 7 Wis. 542.
[7] Scott *v.* Whitlow, 20 Ill. 310.
[8] Miller *v.* Estill, 8 Yerg. 452; Anderson *v.* Tydings, 8 Md. 427. And see

tion restraining a judgment creditor from all proceedings on his judgment recovered at law, has the effect of restraining him from proceedings in equity as well.[1]

§ 91. It has been held that an injunction of a judgment is a release of all errors in the proceedings enjoined.[2] But even under a statute providing that the injunction shall operate as a release of errors at law, the writ will not have this effect if it only restrains the judgment creditor from further proceedings under his execution, without enjoining the judgment itself.[3] And the better doctrine seems to be, that in the absence of any statutory enactment upon the subject the injunction does not necessarily operate as a release of errors in the judgment enjoined.[4] In no event can such an injunction have the effect of releasing errors in the proceedings at law except as to the party obtaining the injunction. Thus a garnishee, who enjoins proceedings against himself under the garnishment, does not thereby release errors that may have occurred in the proceedings against the defendants in attachment.[5]

§ 92. Where it is provided by statute that a party asking an injunction against the enforcement of a judgment shall first release over his signature all errors in entering up the judgment, he is estopped from setting up the fact of his own wrong in having obtained an injunction without such release of errors.[6] But a statute providing that the suing out of an injunction against proceedings under a judgment at law shall operate as a release of all errors in the judgment, does not apply to cases where the act enjoined is itself in violation of law.[7]

Pettingill *v.* Moss, 3 Minn. 222. But see, *contra*, as to the effect of the lien, Keith *v.* Wilson, 3 Met. Ky. 201.

[1] Little *v.* Price, 1 Md. Ch. 182.

[2] Price *v.* Johnson Co., 15 Mo. 433. And in Illinois this is so by statute; see McConnell *v.* Ayres, 3 Scam. 210.

[3] St. Louis etc. *v.* Todd, 40 Ill. 89.

[4] Gano *v.* White, 3 Ohio, 20.

[5] Taylor *v.* Ricards, 9 Ark. 378.

[6] McFarland *v.* Rogers, 1 Wis. 452.

[7] Burge *v.* Burns, 1 Morris, Iowa, 287.

§ 93. As a general rule he who seeks to restrain the enforcement of a judgment at law, or of proceedings under a judgment, must first pay or tender payment of the amount really due, and failing to do this he will be denied relief in a court of equity.[1]

§ 94. A simple contract creditor, whose rights are not yet reduced to judgment, is not entitled to an injunction restraining the disposition of his debtor's property under certain judgments alleged to have been obtained in fraud of his rights, even though he has begun suit at law upon his claim. For, until the creditor's rights are established by judgment at law, interference by equity would necessarily lead to oppressive and often fruitless interruption of the debtor in the rightful enjoyment of his property.[2] Nor does an attaching creditor, who has not yet reduced his claim to judgment, stand in any better light than one who sues by the ordinary process of the courts; and he will not be allowed to enjoin the disposal of the debtor's property on execution, even though the judgments under which the execution issues were fraudulently confessed by the debtor.[3]

§ 95. Where an injunction is sought against proceedings at law under a judgment, the bill, as between the parties to the suit at law, is not considered as an original bill. But if other parties are joined in the bill, and different interests are involved, it is to that extent considered as an original bill.[4] To sustain the injunction the bill should show upon what evidence the judgment was found, as well as what defense complainant has against the judgment, and why such defense was not made upon the trial at law.[5] And in general a perpetual injunction against a judgment will not be allowed unless all the parties in whose favor the judgment was

[1] Baragree *v.* Cronkhite, 33 Ind. 192; Yonge *v.* Shepperd, 44 Ala. 315.

[2] Wiggins *v.* Armstrong, 2 Johns. Ch. 144; Angell *v.* Draper, 1 Vern. 399; Shirley *v.* Watts, 3 Atk. 200; Bennet *v.* Musgrove, 2 Ves. 51; Young *v.* Frier, 1 Stockt. 465; Holdrege *v.* Gwynne, 3 C. E. Green, 26.

[3] Martin *v.* Michael, 23 Mo. 50. But see, *contra*, Heyneman *v.* Dannenberg, 6 Cal. 376.

[4] Dunn *v.* Clarke, 8 Pet. 1.

[5] Buntain *v.* Blackburn, 27 Ill. 406.

rendered are joined as defendants and have filed their answers.[1] So, as a general rule, no person will be allowed to enjoin a judgment to which he is not a party.[2]

§ 96. An injunction should not be granted to stay a judgment, the effect of which would be to retry the issue in equity, where complainant does not allege any surprise or fraud in the trial at law, and no defect of evidence, and where he makes no appeal to the conscience of the defendant for a discovery.[3] Nor will the relief be granted upon grounds which have been fully tried as a defense at law, even though the court may be of the opinion that such defense should have been sustained at law.[4] But the effect of a bill in chancery to enjoin proceedings under a judgment being not to revise the proceedings at law, but rather to urge equities independent of the judgment as affording reasons for not enforcing it, the fact that a writ of error has been sued out upon the proceedings at law constitutes no bar to the awarding of an injunction.[5]

[1] Marshall *v.* Beverly, 5 Wheat. 313.

[2] Jordan's Admr'x. *v.* Williams, 8 Rand. 501.

[3] Brown *v.* Street, 6 Rand. 1.

[4] Marine etc. *v.* Hodgson, 7 Cranch, 332; Bateman *v.* Willoe, 1 Sch. & Lef. 204.

[5] Parker *v.* Judges, 12 Wheat. 561. Marshall, C. J., giving the opinion of the court, says: "It is contended that an injunction could not be awarded while the record was before this court on a writ of error. We do not think this a valid objection. The suit in chancery does not draw into question the judgment and proceedings at law, or claim a right to revise them. It sets up an equity independent of the judgment, which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been and could not be litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal."

II. Cases where Defense should have been made at Law.

§ 97. Judgment will not be enjoined where defense could have been made at law.
98. Remedy at law bars relief in equity.
99. Negligence of complainant a bar to relief.
100. Further illustrations of the rule; absence of witnesses.
101. Failure of proof or difficulty in procuring testimony no ground for the injunction.
102. Applications of the general rule.
103. Further applications of the rule.
104. Judgment in tort; bill must show why defense was not made at law.
105. The general rule applicable to decrees as well as judgments.
106. Recognized exceptions to the general rule.
107. Court will not itself take notice of omission to defend at law.
108. Sickness and coverture grounds for the relief.

§ 97. A general rule underlying the entire jurisdiction of equity to restrain proceedings at law is, that where the person aggrieved has had an opportunity of interposing his defense at law and has had his day in court, but has failed through carelessness or inadvertence to avail himself of the opportunity of interposing such defense at law, he can not afterward make it the ground for relief in equity, and is barred from enjoining proceedings under the judgment. It is not the policy of the law to permit persons to slumber upon their rights when they have an opportunity to assert them in a court of law and afterward to permit their assertion in a court of equity. In the absence, therefore, of any suggestion of fraud, accident, mistake or surprise, and when no good reason is shown why the defense was not made at law, the injunction will not be allowed where it is not obviously against conscience to enforce the judgment.[1]

[1] Marine etc. v. Hodgson, 7 Cranch, 332; Emerson v. Udall, 13 Vt. 477; Pettes v. Bank of Whitehall, 17 Vt. 435; Clute v. Potter, 37 Barb. 199; Windwart v. Allen, 13 Md. 196; Bateman v. Willoe, 1 Sch. & Lef. 204; Commissioners etc. v. Patrick, Sm. & M. Ch. 110; Lafon v. Desessart, 1 Mart. N. S. 71; Meredith v. Benning, 1 Hen. & M. 585; Turpin v. Thomas, 2 Hen.

§ 98. So in all cases where the courts of law afford ample and sufficient remedy for such grievances as may arise in the enforcement of judgments, equity will not interpose. Thus, an

& M. 189; Stanard v. Rogers, 4 Hen. & M. 438; Benton v. Roberts, 8 Rob. La. 224; Ponder v. Cox, 26 Geo. 485: Beaird v. Foreman, Breese, 308; Abrams v. Camp, 3 Scam. 290; Lucas v. Spencer, 27 Ill. 15; Albro v. Dayton, 28 Ill. 325; Shricker v. Field, 9 Iowa, 366; Wilsey v. Maynard, 21 Iowa, 107. And in Marine etc. v. Hodgson, 7 Cranch, 332, the law upon this subject is well laid down by Chief Justice Marshall, as follows: "Without attempting to draw any precise line to which courts of equity will advance, and which they can not pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety, be laid down as a general rule that a defense can not be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law. In the case under consideration the plaintiffs ask the aid of this court to relieve them from a judgment, on account of a defense which, if good anywhere, was good at law, and which they were not prevented, by the act of the defendants, or by any pure and unmixed accident, from making at law. It will not be said that a court of chancery can not interpose in any such case. Being capable of imposing its own terms on the party to whom it grants relief, there may be cases in which its relief ought to be extended to a person who might have defended, but has omitted to defend himself at law. Such cases, however, do not frequently occur. The equity of the applicant must be free from doubt. The judgment must be one of which it would be against conscience for the person who has obtained it to avail himself. The court is of opinion that this is not such a case." Emerson v. Udall, 13 Vt. 477, was a bill in chancery to restrain the enforcement of a judgment founded upon an award of arbitrators. The grounds relied upon were that the original claim was groundless, that the arbitrators exceeded the scope of their authority, and that complainant had not sufficient notice of the time and place of hearing before the arbitrators. The decision of the chancellor dismissing the bill was affirmed, Redfield, J., saying: "It is now, I apprehend, well settled, that a court of equity will not examine into the foundation of the judgment of a court of law, upon any ground which either *was tried*, or *might have been tried*, in the court of law. The judgment of a court of law is conclusive upon all the world as to all matters within its cognizance. If a party fail there by not presenting his defense, when he should have done it, he can have no redress in a court of equity; much less can he expect relief in a court of equity, when

injunction will not be allowed against a judgment on the ground that the officer has made an improper levy and has taken property other than that of the judgment debtor, since the remedy at law against the officer is ample.[1] Nor will equity interfere for the purpose of staying or preventing a sale under an execution on the ground that the judgment has been partially or wholly paid, but will leave the parties to their remedy at law.[2] So an injunction will not be allowed on the ground of neglect of a party to the action, or of his counsel, where such neglect, if excusable, might, under a statute, be made the foundation of a motion for relief in the original action.[3]

§ 99. In illustration of the general rule laid down in the preceding section, that equity will not afford relief where an

he has had a full trial at law upon the very grounds which he now wishes to urge anew. For a court of equity to grant relief in any such case, would be to sit as a court of errors upon the proceedings of the courts of common law, which would be a very invidious, as well as a very unwarrantable assumption. Equity has sometimes interfered to grant relief, when a party, by accident or mistake, without his own default, or by the fraud of the opposite party, has failed of an opportunity to present his defense. So, too, when the ground of defense was exclusively of an equitable character, and such as would not avail the party at law. Beyond this, I know of no good ground upon which a court of equity could interfere to enjoin the party from pursuing a judgment at law."

[1] Chappell *v.* Cox, 18 Md. 513. But see, *contra*, Ames *v.* Myers, 16 How. 492, which was a case of a bill filed on the equity side of the Circuit Court of the United States for an injunction to prevent the sale of slaves which had been taken in execution as the property of another person. The evidence showing that the slaves were the property of complainant and not of the defendant in execution, the Circuit Court was directed to make the injunction perpetual, although it was admitted by the Supreme Court to be in direct conflict with the current of authority, and no sufficient reason appears for the decision. The Supreme Court say: "It is proper to notice that this case is not one of equitable cognizance. The plaintiff had a clear and adequate remedy at law under the Code of Practice of Louisiana. C. P. 298, § 7. It is not usual for this court to take an exception of this nature on its own motion and where no objection has been made by the defendant. But this case is one so clearly beyond the limits of the equitable jurisdiction of the Circuit Court that the fact is noticed that it may not serve as a precedent." Campbell, J.

[2] Lansing *v.* Eddy, 1 Johns. Ch. 49; Foster *v.* Wood, 6 Johns. Ch. 87. And see Parker *v.* Jones, 5 Jones Eq. 276.

[3] Borland *v.* Thornton, 12 Cal. 440.

opportunity has been had of interposing the defense at law, it may be said that even where it is manifest that great hardship has been done the defendant at law by the judgment rendered against him, still if such hardship does not result from any fraud or surprise on the part of plaintiff, but is merely the result of negligence in making proper defense at law, relief against the judgment will be refused.[1] And the fact that the enforcement of a judgment would be against conscience will not, of itself, warrant an injunction; however unjust and unconscionable the demand may be on which judgment was obtained, if through neglect or carelessness no defense was interposed at law, relief will not be granted in equity.[2]

§ 100. Where it plainly appears that the equities on which complainant asks for relief against a judgment might have availed him in a plea of *non est factum* in the action at law, and no excuse appears for his not so defending at law, the injunction will be refused.[3] Nor is it any ground for relief against the judgment that the pleas interposed by defendant to the action at law were held unsupportable, since the proper remedy is by revising the decision of the court of law, rather than by resorting to equity.[4] So the absence of a material witness, upon the trial at law, affords no ground for enjoining the judgment, since the court of law had ample powers to give relief by a continuance, or a new trial, and even though it refused so to do, equity will not revise and correct the errors of courts of law.[5] Nor will the fact that defendant in the original action was unable to establish his defense, owing to the unexpected absence of the plaintiff, whom he had not called as

[1] Tapp v. Rankin, 9 Leigh, 478.

[2] Ponder v. Cox, 26 Geo. 485.

[3] Harden v. Garden, 7 Leigh, 157; Mershon v. Bank etc., 6 J. J. Marsh. 438. But in Spotswood v. Higgenbotham, 6 Munf. 313, the relief was granted against a judgment upon a bail bond upon the ground that the defendant had not executed the bond, and that, therefore, he had regularly no day in court, and was not bound to take any steps in the action at law. The case is clearly against the weight of authority, since the plea of *non est factum* would have been a sufficient defense to the action.

[4] Moore v. Dial, 3 Stew. 155.

[5] Chapman v. Scott, 1 Cranch C. C. 302.

a witness, warrant a court of equity in enjoining against the judgment in the absence of fraud.[1]

§ 101. Failure of proof upon the trial at law will not, in the absence of fraud, accident, mistake, or other adventitious circumstances, warrant a court of equity in granting relief against the judgment. Thus, where complainant asks an injunction against a judgment, alleging in his bill that he is now able to prove the matter of his plea in defense of the action at law, which he was unable to prove upon the trial, but does not suggest fraud, accident, mistake, or other circumstances as the cause of such failure of proof, the injunction will not be allowed.[2] So if the failure or omission to prove facts material to the defense was caused by the advice of counsel, equity will not relieve against the judgment.[3] And general allegations of difficulty in procuring vouchers and of unavoidable delay in settling accounts are not sufficient to warrant the interposition of equity.[4]

§ 102. An injunction will not be allowed to restrain the enforcement of a judgment, or to declare it invalid, because of a defect of which the person complaining had knowledge during the pendency of the suit, but of which he failed to avail himself at that time.[5] Nor will the injunction be granted on the ground that the defendant at law had a good and sufficient defense to the action, but was kept away from attendance at court by threats of bodily harm, it not appearing that he made any efforts to be defended by counsel.[6] Nor is it a sufficient excuse for neglecting to make defense at law that the defendant wrote to counsel to interpose a defense, but that his letter arrived too late for this purpose, and where this is the only equity relied upon, a court of chancery will not interpose.[7]

§ 103. Allegations in the bill of usury in the contract upon

[1] Wilder v. Lee, 64 N. C. 50.
[2] Norris v. Hume, 2 Leigh, 334.
[3] Fentress v. Robins, N. C. Term R. 177.
[4] Wilson v. Bastable, 1 Cranch C. C. 394.
[5] Wilsey v. Maynard, 21 Iowa, 107.
[6] Duncan v. Gibson, 45 Mo. 352.
[7] Stanard v. Rogers, 4 Hen. & M. 438.

which judgment was obtained, will not avail in procuring an injunction, since the usury would have been a good and sufficient defense to the original action before judgment obtained.[1] Nor will the relief be allowed upon the ground that defendant was a minor, since such defense might have been interposed at law; and where one has slept upon his legal rights until they are barred by the statute of limitations, he is estopped from relief in equity.[2] So judgment on a note will not be restrained on the ground that payment had been made upon the note with which the judgment debtor was not credited, it not appearing that he had made any effort to establish the fact of payment in the action at law.[3] And, generally, it may be said that where defendant in the action at law had any defense in bar of the action, which he neglected to interpose in the legal forum, he will not receive the aid of equity in restraining the judgment.[4] Nor in the application of the rule does it matter whether the judgment which is sought to be enjoined was obtained by default or upon a verdict.[5] And proceedings under a judgment will not be enjoined on the ground that the defendant in the action at law, being engaged in public business, was precluded from attending at the trial.[6] Nor will the relief be granted because the verdict was found upon the testimony of one witness who had been suborned to swear falsely, nor because the court of final resort had refused a new trial.[7]

§ 104. Equity will not interfere to restrain a judgment at law in an action for a tort where the equities relied upon as the foundation of the bill might have been interposed as a defense to the action at law; and especially will the interference be denied when a new trial has been refused at law.[8] And

[1] Lansing *v.* Eddy, 1 Johns. Ch. 49.
[2] Clark *v.* Bond, Wright, 282.
[3] Commissioners etc. *v.* Patrick, Sm. & M. Ch. 110.
[4] Windwart *v.* Allen, 13 Md. 196.
[5] Turpin *v.* Thomas, 2 Hen. & M. 139.
[6] Smith *v.* Lowry, 1 Johns. Ch. 320.
[7] Id.
[8] Meredith *v.* Benning, 1 Hen. & M. 585. And see, as to the relief where a new trial had been denied at law, Smith *v.* Lowry, 1 Johns. Ch. 320, *supra*.

where a bill is filed for an injunction in a case where complete relief might have been had by defending at law, the bill must clearly show why the defense was not asserted in the legal forum.[1]

§ 105. The general rule under consideration as applicable to judgments at law applies equally to decrees in equity. And a final decree in equity will not be enjoined on grounds of equity existing prior to its rendition, and which might have been relied upon in the original suit, unless the equities are such as to authorize a bill of review.[2]

§ 106. To the general rule as laid down in the preceding sections, that equity will not enjoin a judgment at law where the defense might have been urged upon the trial, there are some exceptions resting upon well-recognized principles of equitable jurisprudence. Most of these exceptions will be found to fall under the heads of fraud, accident, mistake, surprise, and ignorance, and will be noticed hereafter in this chapter. It may be said, generally, that where it appears that the courts of law do not afford as safe and convenient a remedy as courts of equity, or where it is doubtful whether, according to the jurisdiction and practice of the common law courts, the defense is legally available there, or, if available, attended with doubt, difficulty, and embarrassment, equity may grant relief against the judgment.[3] So where strong equities exist against the enforcement of a judgment, which, from the nature of the case, could not have been pleaded in defense of the action at law, they may afford ground for restraining the judgment.[4] And the fact that the rights in issue are equitable rather than legal in their nature, will afford additional reason for enjoining the proceedings.[5]

§ 107. Where the judgment debtor has failed to defend at law, and afterward attempts to enjoin the judgment on grounds

[1] Yancy v. Fenwick, 4 Hen. & M. 423.

[2] Moran v. Woodyard, 8 B. Mon. 537.

[3] Crawford v. Thurmond, 3 Leigh, 85; Mewborn v. Glass, 5 Humph. 520. And see Spotswood v. Higgenbotham, 6 Munf. 313.

[4] Scott v. Shreeve, 12 Wheat. 605.

[5] Crawford v. Thurmond, 3 Leigh, 85.

constituting a defense either at law or in equity, the court will not of its own motion take notice of the failure to defend at law. And if the defendant in the injunction suit does not avail himself of such failure, but answers over on the merits, equity will entertain jurisdiction and will enjoin the judgment.[1] If, however, the defense is purely legal, and in its nature unfit for equity jurisdiction, the defendant in the injunction suit may insist upon the want of jurisdiction at the hearing, even though he may not have demurred, but pleaded to the merits instead.[2]

§ 108. Sickness of the defendant at law at the time process was served upon him, is held sufficient to warrant an injunction against the judgment, even though no defense was interposed to the action.[3] So if defendant in the suit at law was not *sui juris*, as in the case of a *feme covert*, the judgment may be restrained.[4] And a judgment by default against a *feme covert* being a nullity, its enforcement against her separate estate will be enjoined.[5] And the same strictness of proof is not required to establish an excuse for not making the defense at law as would be requisite to establish the defense itself upon a trial.[6]

[1] Galbrath *v.* Martin, 5 Humph. 50.
[2] Rice *v.* Rail Road Bank, 7 Humph. 89.
[3] Id.
[4] Griffith *v.* Clarke, 18 Md. 457.
[5] Id.
[6] Rice *v.* Rail Road Bank, *supra.*

III. Of Judgments obtained through Fraud.

§ 109. Fraud in obtaining the judgment a ground of injunction.
110. Illustrations of the rule.
111. Fraudulent alteration of records.
112. Fraudulent representations on the part of plaintiff at law.
113. Cases where fraud could not be urged in defense at law.
114. Party aggrieved must be diligent in asserting his rights.
115. Construction of fraud; equity only controls the parties.
116. Violation of agreement ground for enjoining judgment.
117. Forged assignment of bond.
118. Special cases.

§ 109. The most frequent exceptions to the rule that an injunction will not be allowed against proceedings under a judgment where the defense should have been made at law, are cases where the judgment was obtained through such fraudulent conduct or such deceitful representations as prevented the defendant from asserting his rights in the legal tribunal. Indeed, the exceptions thus recognized are sufficient to constitute a rule of themselves, and it may be said, generally, that where through fraud upon the part of plaintiff or his representatives, defendant is prevented from making his defense at law, equity will relieve against the judgment.[1] The rule, however, as thus stated, is to be taken with the qualification that the relief will not be granted because of fraud alone, but only where the person aggrieved shows a good reason why the defense was not made at law.[2] This being shown, and it appearing that defendant was prevented from the assertion of

[1] Carrington v. Holabird, 17 Conn. 530; Pearce v. Olney, 20 Conn. 544; Wierich v. DeZoya, 2 Gilm. 385; Burpee v. Smith, Walk. Mich. 327; Kent v. Ricards, 3 Md. Ch. 392; Greene v. Haskell, 5 R. I. 447. And in Pearce v. Olney, 20 Conn. 544, the court say: "Indeed this falls directly within and is but an illustration of the general rule that equity will interfere to restrain the use of an advantage gained in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice, in all cases where such advantage has been gained by fraud, accident, or mistake of the opposite party."

[2] Lacy v. Administrators etc., 1 Ohio, 256.

his rights by fraud, unmixed with negligence of his own, a court of equity will afford relief, either by opening the case and allowing another trial, or by awarding a perpetual injunction.[1]

§ 110. Even though a judgment has been entered by consent of the parties and as the result of a compromise between them, it may still be enjoined upon grounds of fraud, accident, or mistake.[2] And where defendant had a good and meritorious defense upon the merits, but was prevented from asserting it by receiving assurances in writing from plaintiff's attorney that nothing further would be done in the suit until he was notified, the injunction was allowed.[3] So where defendant, through fraud and improper management of the adverse party and with no fault of his own, was prevented from pleading a discharge in bankruptcy against the action at law, the relief was granted.[4] Nor is the power of a court of chancery to grant the relief taken away by a statute conferring upon the court of law in which the judgment was obtained authority to grant a new trial in such a case.[5]

§ 111. The fact that after judgment and execution the records of the court were fraudulently altered and the amount of the judgment increased, without the knowledge or consent of the judgment debtor, is sufficient to warrant a court of equity in restraining the enforcement of the judgment.[6] And in such case, although the execution might be staid by motion in the court rendering the judgment, yet since the

[1] Wierich *v.* DeZoya, 2 Gilm. 385.

[2] Hahn *v.* Hart, 12 B. Mon. 426.

[3] Pearce *v.* Olney, 20 Conn. 544.

[4] Carrington *v.* Holabird, 17 Conn. 530; Starr *v.* Heckart, 32 Md. 267. But see, *contra*, Katz *v.* Moore, 13 Md. 566, where it is held that a judgment at law will not be enjoined because of the discharge of the judgment debtor under the insolvent laws of a state previous to the rendering of such judgment, even though the cause of action accrued before the discharge was granted, the court holding that while the legal liability of the insolvent to pay his debts had ceased, the moral obligation remained as strong as before and was sufficient to sustain the judgment.

[5] Carrington *v.* Holabird, 17 Conn. 530.

[6] Babcock *v.* McCamant, 53 Ill. 214.

relief sought goes to the judgment itself, equity may properly entertain jurisdiction.[1]

§ 112. Where, through the representations and fraudulent conduct of the plaintiff, defendant is lulled into security, so that he does not make diligent defense to the action at law, he is entitled to relief in equity.[2] And where defendant might have successfully pleaded *non est factum* to an action upon a note, but was prevented from so doing by the representations of plaintiff, an injunction will be granted.[3] But an injunction will not lie to restrain a judgment against complainant on a note executed by him as surety, the only equity in support of the bill being that fraudulent representations were made by the principal to obtain the signature of the surety, no fraud or misrepresentation being charged upon the payee.[4]

§ 113. It not unfrequently happens from the peculiar nature and circumstances of the case that the fraud on which a judgment is predicated can not be set up or urged in a legal tribunal. In such cases a court of chancery will afford relief by enjoining proceedings under the judgment.[5] Thus, where a bond on which judgment was obtained was procured by fraudulent and oppressive conduct, and it is by no means clear that a court of law could give the relief asked for, the judgment may be enjoined in equity.[6] So an injunction has been granted against a judgment on a note given for the purchase price of a horse, on the ground of deceitful and fraudulent representations as to his soundness, it appearing that he was unsound.[7] And a judgment for the purchase money of personal property may be enjoined on the ground that,

[1] Id.

[2] Webster v. Skipwith, 26 Miss. 341. And see Pearce v. Olney, 20 Conn. 544.

[3] Poindexter v. Waddy, 6 Munf. 418.

[4] Griffith v. Reynolds, 4 Grat. 46.

[5] Collier v. Easton, 2 Mo. 117 (2 Ed.); West v. Wayne, 3 Mo. 13 (2 Ed.).

[6] West v. Wayne, 3 Mo. 13 (2 Ed.).

[7] Waters v. Mattingly, 1 Bibb, 244. From the case as reported it does not appear that any defense was attempted in the suit on the note, but that it was first interposed in the bill for the injunction.

contrary to the representations of the vendor, the property was encumbered with liens to an amount beyond its value.[1]

§ 114. He who seeks the aid of equity to prevent the enforcement of a judgment upon the ground of fraud, must show due diligence in the assertion of his rights. And where defendant has allowed a suit to proceed to judgment without any attempt on his part to obtain proof, an injunction will not be allowed on the ground of fraud in the original transaction on which the suit was founded.[2] So where the fraud relied upon might have been used as a defense to the action at law, but it does not appear whether it was so used, or whether defendant neglected to avail himself of it, the judgment will not be restrained.[3] But a judgment may be enjoined because of fraud in obtaining a bill of sale on which the action was brought.[4]

§ 115. Where the equitable jurisdiction of the court is conferred entirely by statute and is limited to cases of fraud, accident, mistake or account, fraud is construed to mean actual fraud in its strictest sense; and this not appearing in the bill the injunction will be refused.[5] And it is to be observed that the jurisdiction of equity in restraining proceedings under a judgment is not exercised by assuming control over the court in which the proceedings were had, but by controlling the parties to the action.[6] Hence a magistrate before whom a judgment was rendered should not be made a party to the injunction suit; but an officer having an execution in his hands still in force is a necessary party.[7]

§ 116. Where plaintiff's attorney has taken judgment contrary to his express agreement with defendant, the agreement being within the scope of the attorney's authority, the enforcement of the judgment may be enjoined upon the

[1] Poe v. Decker, 5 Ind. 150. But it does not appear from the report whether the defendant was apprised of the facts in time to defend at law.

[2] Marsh v. Edgerton, 1 Chand. 198.

[3] Parker v. Morton, 5 Blackf. 1.

[4] Crawford v. Crawford, 4 Dessaus. Eq. 176.

[5] Gilder v. Merwin, 6 Whart. 522; Riley v. Ellmaker, Ib. 545.

[6] Burpee v. Smith, Walk. Mich. 327.

[7] Id.

ground of fraud.[1] So a judgment obtained in violation of an express agreement and an entry on the docket of the court, may be enjoined, even though the judgment creditor does not threaten its enforcement; since his refusal to release the judgment is equivalent to a threat of its enforcement and the injunction is necessary for the protection of the judgment creditor.[2] And where, in direct violation of an agreement between the parties, the judgment creditor has failed to credit his debtor with a payment upon the judgment, and is proceeding to collect the whole, an injunction will be granted.[3]

§ 117. So equity may relieve against a judgment recovered against the obligor in a bond by one claiming under a forged assignment, even though the obligor had notice of the fact; since the action being brought in the name of the obligee to the use of the pretended assignee, the obligor is precluded from any inquiry into the genuineness of the assignment in the trial at law, and payment under such circumstances would not protect him against the claim of the rightful owner of the bond.[4]

§ 118. Equity being competent to relieve against an ordinary judgment in a court of law, may also relieve against an execution issued under a statutory judgment springing into being upon the forfeiture of a forthcoming bond, where fraud has been used in obtaining the forfeiture of the bond.[5] So an injunction will be allowed against a sale upon execution under a judgment obtained by collusion, where the property levied upon was purchased with complainant's funds, the judgment having been obtained and the levy procured for the purpose of defeating complainant's claim to the property.[6] And where a judgment has been obtained by default upon a prior judgment, of which the judgment creditor has given a

[1] Kent v. Ricards, 3 Md. Ch. 392.
[2] Chambers v. Robbins, 28 Conn. 552.
[3] Newman v. Meek, Sm. & M. Ch. 331.
[4] Griffith v. Reynolds, 4 Grat. 46.
[5] Nunn v. Matlock, 17 Ark. 512.
[6] Greene v. Haskell, 5 R. I. 447.

discharge which would have been effectual if pleaded at law, its execution may be restrained.[1]

IV. Of Accident, Mistake, Ignorance and Surprise.

§ 119. Foundation of the jurisdiction; loss of instruments.
120. Distinction between mistakes of law and of fact.
121. Mistakes of fact.
122. Mistakes of fact.
123. Entire judgment will not be enjoined where only part is erroneous.
124. Distinction between ignorance of law and of fact.
125. Ignorance of fact a ground of injunction.
126. Want of notice on the part of defendant at law.
127. Promissory notes.
128. Surprise a ground for relief.

§ 119. The jurisdiction of equity in restraint of judgments obtained against persons who, through accident, mistake, ignorance, or surprise, have been prevented from establishing their defense at law, results from its well established jurisdiction over these general subjects, and is governed by the same general principles. The relief is extended, primarily, for the prevention of irreparable mischief which the courts of law are powerless to redress. Thus, the loss at the time of trial of a written agreement between the maker and payee of a note, relating to the contract in pursuance of which the note was made, and without which the maker could not establish his defense at law, will authorize an injunction against the judgment.[2] And the loss of a written instrument which would have operated as a defeasance of a bond, has been deemed sufficient to warrant an injunction against the judgment, even where the defense was not relied upon at law.[3] So equity

[1] Devoll v. Scales, 49 Maine, 320. The case is imperfectly reported, and it does not appear whether defendant had any opportunity of pleading the discharge at law, except in the statement of the court that the judgment was obtained without right, and without the knowledge of the defendant.

[2] Vathir v. Zane, 6 Grat. 246.

[3] Wilson v. Davis, 1 Marshall, 219.

will restrain a judgment on the ground that the debt on which the action was brought had been paid, defendant having been prevented from pleading such payment at law by accident, and without laches on his part.[1]

§ 120. With regard to the relief against judgments obtained through mistake, a distinction is drawn between cases where the mistake is one of fact and where it is of law. And while in the former case the relief is freely exercised upon sufficient cause shown, equity will not interfere where the mistake is one of law.[2] Thus a naked mistake in law will not warrant an injunction against a judgment upon a note which was executed voluntarily and with full knowledge of all the facts.[3] Nor will the relief be awarded where the mistake is mutual to both parties to the action, as where defendant confessed judgment for the purpose of afterward removing the cause to a higher court on appeal, and it being afterward found that the right of appeal did not exist.[4] Even though the damages are obviously excessive, yet there being no fraud, but simply a mistake of law in which both parties have joined, the injunction will be refused.[5] Nor will the fact that the mistake was caused by the suggestion and advice of the court constitute sufficient ground for an injunction.[6]

§ 121. Though a mistake of law does not constitute sufficient ground to restrain a judgment, as we have seen in the preceding section, yet a mistake of fact will frequently warrant a court of equity in the exercise of this jurisdiction. Thus, a judgment obtained through mistake, for an amount greater than that actually due, constitutes such a case as will warrant the interposition of equity.[7] If, however, the judgment has been rendered on an account stated between the parties, the

[1] Humphreys v. Leggett, 9 How. 297.

[2] Hubbard v. Martin, 8 Yerg. 498; Richmond v. Shippen, 2 P. & H. Va. 327; Risher v. Roush, 2 Mo. 77 (2 Ed.); Meem v. Rucker, 10 Grat. 506; Shricker v. Field, 9 Iowa, 366.

[3] Hubbard v. Martin, 8 Yerg. 498.

[4] Richmond etc. v. Shippen, 2 P. & H. Va. 327.

[5] Id.

[6] Risher v. Roush, 2 Mo. 77 (2 Ed.).

[7] Chase v. Manhardt, 1 Bland, 333.

amount due being agreed upon, it will not be enjoined because of an alleged mistake in the account, which was not discovered until after the verdict was rendered, and after the time for a new trial had elapsed.[1] Where the appearance of a defendant was entered by mistake, and without service of process upon him, a proper case is afforded for relief against the judgment; but, in such case, the injunction should not be made perpetual, and should only continue until defendant can be let in to make his defense at law in the court where the judgment was *obtained.*[2] But the fact that process was served upon the *wrong* person, who makes no defense at law, but allows judgment to be taken against him by default, and, execution having issued, gives a forthcoming bond, will not warrant an injunction.[3]

§ 122. A judgment of an inferior court may be enjoined where complainants show a good defense upon the merits, which they were prevented from making by the dismissal of their appeal, because of a mistake of the clerk in not drawing the appeal bond properly, and without fault on their part.[4] Even after one injunction against a judgment has been dissolved, another may be granted and made perpetual upon new matter of which complainant was ignorant at the time of the dissolution of the first, the new equity consisting of a mistake as to an important fact of which both parties were ignorant at the time the judgment was obtained and the former injunction dissolved.[5] And a mistake or a miscalculation of the jury, such as, if discovered in time, would have furnished good ground for a new trial, will warrant a court of equity in restraining a judgment.[6]

§ 123. Where the mistake consists either in awarding judgment or in issuing execution for an amount greater than that which is actually due, the injunction should be allowed only

[1] Falls v. Krebs, 5 Md. 365.
[2] Campbell v. Edwards, 1 Mo. 281 (2 Ed.).
[3] Chisholm v. Anthony, 2 Hen. & M. 13.
[4] Saunders v. Jennings, 2 J. J. Marsh. 513.
[5] Armstrong v. Hickman, 6 Munf. 287.
[6] Rust v. Ware, 6 Grat. 50.

as to the excess over and above that justly due. Thus, where through mistake, judgment is obtained for too great an amount, the verdict itself will not be disturbed as to the sum really due, nor will a new trial be ordered; the judgment will merely be enjoined as to the excess and allowed to operate as to the remainder.[1] Or where an error has been committed in issuing a writ of *fi. fa.* for an amount greater than that to which the judgment creditor is entitled, the injunction will be limited to the amount erroneously included, and the whole judgment will not be enjoined.[2]

§ 124. The distinction already observed between mistakes of law and of fact in the exercise of the jurisdiction of equity in restraint of judgments, applies with equal force to cases where the relief is sought upon the ground of ignorance. And it is held that, while ignorance of material facts necessary to establish a legal defense may warrant the interposition of equity, ignorance of law does not afford sufficient reason for the exercise of the jurisdiction.[3] Thus, where one has failed to make his defense at law through ignorance of the nature of the proceedings against him, and of the necessary steps to be taken, he will not be allowed to enjoin the judgment.[4]

§ 125. It may be laid down as a general rule that ignorance of important facts material to the establishing of a defense to the action at law, will, in the absence of laches on the part of defendant, warrant a court of equity in extending relief by injunction against the judgment.[5] Thus, where defendant, before and at the time of recovering judgment against him,

[1] Chase *v.* Manhardt, 1 Bland, 333.

[2] Barrow *v.* Robichaux, 14 La. An. 207.

[3] Meem *v.* Rucker, 10 Grat. 506; Shricker *v.* Field, 9 Iowa, 366.

[4] Meem *v.* Rucker, 10 Grat. 506. And it is held that in such case, a mere averment of the facts relied upon to entitle complainant to relief against the judgment, will not suffice, but the matter alleged in excuse for not having defended at law, must be proven. Id. Upon this point the case certainly lacks the weight of authority, and it is believed that no other decision has gone to this extent.

[5] Hubbard *v.* Hobson, Breese, 147; Iglehart *v.* Lee, 4 Md. Ch. 514; Cape Sable Company's Case, 8 Bland, 606. And see Williams *v.* Lee, 3 Atk. 223; LeGuen *v.* Gouverneur, 1 Johns. Cas. 436; Barker *v.* Elkins, 1 Johns. Ch. 465; Duncan *v.* Lyon, 3 Johns. Ch. 351.

was ignorant of facts which would have constituted a valid defense at law, an injunction may be allowed to restrain the judgment.[1] So where by collusion upon the part of the president of a corporation, judgment was entered against the corporation, its stockholders who were ignorant of the proceedings, and had no opportunity of resisting the judgment, are entitled to an injunction.[2]

§ 126. Where judgment has been rendered against defendant without notice and without appearance or defense on his part, the sheriff having made a false return of service, equity will relieve against the judgment on the ground that the circumstances rendering it void are extrinsic to the judgment, and a court of law is, therefore, powerless to arrest its execution.[3] Nor, in such a case, is it material to inquire whether a defense could have been made at law, the injury complained of being that the judgment was rendered without notice and without opportunity to defend.[4] But it is held that an allegation in the bill that defendant in the action at law did not come into possession of the facts upon which he asks relief against the judgment, will not, of itself, suffice, but it must appear that he could not have obtained such data by the use of ordinary diligence.[5]

§ 127. Proceedings under a judgment in favor of the assignee of a note for valuable consideration, will not be restrained where the assignee was ignorant of complainant's equities when he took the note, even though such equities might warrant the court in restraining the payee of the note from its collection.[6] But the rule is otherwise where the assignee has taken the note with notice.[7]

§ 128. Surprise will authorize a court of equity to interfere

[1] Iglehart v. Lee, 4 Md. Ch. 514; Hubbard v. Hobson, Breese, 147. See also Holt's Ex'rs. v. Graham, 2 Bibb, 192; Cunningham v. Caldwell, Hardin, 131.

[2] Cape Sable Company's Case, 3 Bland, 606.

[3] Ridgeway v. Bank etc., 11 Humph. 523.

[4] Id.

[5] Leggett v. Morris, 6 Sm. & M. 723.

[6] Donelson v. Young, Meigs, 155.

[7] King v. Baker, 1 Yerg. 450.

in certain cases and restrain proceedings under a judgment. Thus, where defendant had no knowledge of the existence of the suit at law against him until after judgment obtained, an injunction has been allowed on the ground of surprise.[1] But an execution under a judgment in attachment will not be enjoined on the ground of surprise where process was actually served upon the defendant.[2] Nor can the validity of the judgment upon which the attachment was issued be assailed collaterally in a suit in equity to restrain proceedings under the judgment.[3] Where the consideration for the promise on which the action was brought was money lost at gaming, if the defendant is surprised at the trial, he may afterward come into equity for relief.[4]

V. Of Irregular, Erroneous and Void Judgments.

§ 129. Mere irregularities in the proceedings afford no ground for an injunction.
130. Errors at law no ground for injunction.
131. Void judgments will not be enjoined.

§ 129. It is a well established rule that the interference of equity will not be granted for the purpose of correcting mere irregularities or informalities in judicial proceedings. And where a judgment is assailed upon the ground of irregularity in the proceedings antecedent to obtaining the judgment, an injunction will not be allowed.[5] Thus, in the absence of allegations of fraud, irregularities in the service of process will not constitute ground for an injunction, upon the general principle that equity will not sit as a court of review to revise

[1] Mosby v. Haskins, 4 Hen. & M. 427.
[2] Peters v. League, 13 Md. 58.
[3] Id.
[4] White v. Washington, 5 Grat. 645.
[5] Gardner v. Jenkins, 14 Md. 58; Boyd v. Chesapeake etc., 17 Md. 195; Stites v. Knapp, 2 Ga. Decis. 36.

irregularities in proceedings at law.[1] Especially will the relief be refused in such case where the bill admits an indebtedness without offering to pay it.[2] So equity will not restrain an execution for such irregularities as entering up the judgment in the firm name instead of the individual names of the persons composing a partnership, the remedy at law being considered ample by a motion to set aside the judgment.[3]

§ 130. In accordance with the general principle noticed in the preceding section, that equity will not sit as a court of errors to revise or correct proceedings at law, an injunction will not be granted against a judgment because of errors in the proceedings at law, or in the rulings of the court, but the judgment will be left to be reversed in a court of error.[4] An additional reason for refusing the relief upon the ground of error, is found in the fact that if the jurisdiction were entertained it would be virtually permitting the error of a court of law to create an equity.[5] Especially where complainant admits the debt to be due will the interposition of equity be refused, though it be alleged that the judgment is erroneous and contrary to law.[6] Even where the error relied upon may have been sufficient to warrant a new trial at law, equity will not interfere.[7] Nor is the fact that a court of law has erred in overruling evidence which should have been admitted, sufficient to warrant equity in departing from the rule here laid down.[8] And where a judgment has been

[1] Gardner v. Jenkins, 14 Md. 58; Boyd v. Chesapeake etc., 17 Md. 195; Stites v. Knapp, 2 Ga. Decis. 36.

[2] Gardner v. Jenkins, 14 Md. 58.

[3] McIndoe v. Hazelton, 19 Wis. 567. But in Hampson v. Weare, 4 Iowa, 18, an injunction against an execution was upheld on the ground that the execution was improperly and irregularly issued.

[4] Stockton v. Briggs, 5 Jones Eq. 309; Reynolds v. Horine, 13 B. Mon. 234; Dunn v. Fish, 8 Blackf. 407; Cassel v. Scott, 17 Ind. 514.

[5] Stockton v. Briggs, 5 Jones Eq. 309.

[6] Reeves v. Cooper, 1 Beas. 223, affirmed on appeal to the Court of Errors and Appeals, Ib. 498.

[7] Reynolds v. Horine, 13 B. Mon. 234.

[8] Dunn v. Fish, 8 Blackf. 407; Vaughn v. Johnson, 1 Stockt. 173. In the latter case the court say: "An interference on such ground would convert the court of chancery into a court of errors, and would be an assumption

affirmed by a court of final resort, which court overlooked a material defect in the proceedings, thereby confirming an erroneous judgment, an injunction will not be granted.[1]

§ 131. With reference to the jurisdiction by way of injunction against judgments which are void, while there is some conflict of authority among the decided cases, the rule may be regarded as established that equity will not interfere, but will leave the parties aggrieved to seek their remedy at law.[2] Thus, where a judgment and an execution thereunder were absolutely void, relief has been denied in equity on the ground that there was adequate remedy at law by applying to the court in which the judgment was rendered.[3] So where a judgment is void for want of jurisdiction in the court in which the proceedings were had, equity will refuse to enjoin and will leave the parties to the common law remedy by writ of *certiorari*.[4]

VI. Of Judgments upon Usurious Contracts.

§ 132. Equity will not usually enjoin judgments on account of usury.
133. Exception to the rule.

§ 132. Though courts of equity and of law both have jurisdiction in matters of usury, yet where a cause has been submitted to the legal forum and there decided, equity will not after-

of jurisdiction which does not belong to the court. If the defense is equally available at law as in equity and the party has had an opportunity of making the defense at law, a court of equity has no jurisdiction to relieve against the judgment, unless some special ground for the relief can be established, other than that of error in law committed by the court which had jurisdiction of the case."

[1] Nicholson v. Patterson, 6 Humph. 394.

[2] Sanchez v. Carriaga, 31 Cal. 170; Crandall v. Bacon, 20 Wis. 639. But see, *contra*, Caruthers v. Hartsfield, 3 Yerg. 366, where it is held that a void judgment will be perpetually enjoined, even though a remedy may exist at law.

[3] Sanchez v. Carriaga, 31 Cal. 170.

[4] Crandall v. Bacon, 20 Wis. 639. And see, as to defect in jurisdiction, Stokes v. Knarr, 11 Wis. 389.

wards relieve against the judgment in the absence of any special circumstances of fraud, or complicated and embarrasssing facts with which the usury is connected.[1] And the fact that defendant in the action at law upon the usurious contract has had an opportunity to defend on the ground of usury, of which he has failed to avail himself, will estop him from relief in equity, no fraud or misconduct being shown on the part of plaintiff at law.[2]

§ 133. Notwithstanding the rule as above stated is well established, and equity will rarely interfere upon the ground of usury where an opportunity has been neglected of asserting such defense at law, yet there may be cases surrounded with such peculiar circumstances as to render a court of law an inconvenient tribunal, and thus compel a resort to equity. And where the remedy at law is attended with embarrassment and difficulty, the transaction involving a large number of contracts, and being exceedingly complex in its nature in consequence of the devices resorted to for the purpose of concealing the usury, a court of equity may properly interfere.[3]

VII. Of Judgments upon Gaming Contracts.

§ 134. Courts inclined to enjoin judgments on gaming contracts.
135. Defense should usually be made at law.

§ 134. Where the consideration for the contract on which the action at law is founded was money lost at gaming, and judgment is obtained against defendant, courts of equity are inclined to be somewhat more liberal in the exercise of their restraining jurisdiction than in ordinary cases, and upon considerations of public policy and the necessity of the prevention of gaming they will generally restrain proceedings under

[1] Lindsley v. James, 3 Cold. 477.

[2] Buchanan v. Nolin, 3 Humph. 63; McKoin v. Cooley, Ib. 559; Lansing v. Eddy, 1 Johns. Ch. 49; Morgan v. England, Wright, 112.

[3] Frierson v. Moody, 3 Humph. 561.

the judgment.[1] Thus, where defendant in an action upon a gaming contract was prevented by surprise from making his defense available at law, equity will afford relief, even though he made no effort to obtain a new trial at law.[2] Nor will the fact that the gaming contract has been assigned for value to an innocent holder, ignorant of the origin of the contract, prevent equity from affording relief against the judgment, where gaming is prohibited by statute, even though no defense was interposed at law.[3] In such case the circulation of gaming contracts or securities is considered an evil of equal magnitude with giving them, and one which authorizes the interference of equity by enjoining proceedings under the judgment.[4]

§ 135. Although, as we have seen, courts of equity are inclined to look favorably upon applications for relief against judgments obtained upon gaming contracts, yet they are loth to depart from the principle of refusing to interfere where no defense was attempted at law. And it is held that a note given for a gaming consideration, being absolutely void in itself, full and adequate defense can be made at law, and a court of equity will refuse to relieve where there was no attempt at such defense.[5] And in the absence of any excuse

[1] White *v.* Washington, 5 Grat. 645; Woodson *v.* Barrett, 2 Hen. & M. 80; Skipwith *v.* Strother, 3 Rand. 214.

[2] White *v.* Washington, 5 Grat. 645. And it is said by the court in this case that "The case of a gaming promise or security is an exception to the general rule on the subject, that rule being derived from the obligation of the party in most cases to avail himself of his opportunity to defend himself at law. Whereas in the case of a gaming promise or security he is under no such obligation. And as he may at first waive all defense at law and seek relief in equity, so when he is prevented by surprise from making his defense available at law he is not bound to pursue it further in that forum but may resort to equity."

[3] Woodson *v.* Barrett, 2 Hen. & M. 80; Skipwith *v.* Strother, 3 Rand. 214.

[4] Woodson *v.* Barrett, 2 Hen. & M. 80. But see Nelson's Adm'r. *v.* Armstrong, 5 Grat. 354, where it is held that in case of doubt as to whether the judgment creditor to whom the debt was transferred took it in ignorance that it was founded upon a gaming consideration, an injunction already granted will not be dissolved, but will be retained until an issue at law can determine the fact.

[5] Giddens *v.* Lea, 3 Humph. 133.

for not having defended at law upon a bond given for money lost in gaming, the judgment will not be enjoined.[1]

VIII. SET-OFF.

§ 136. Off-sets not generally sufficient ground for injunction against judgment.
137. Damages recoverable at law no ground for the relief.
138. Equitable set-offs may warrant an injunction.
139. Defendant may enjoin judgment if prevented without fault from pleading set-off at law.
140. So also if ignorant of set-off at time of trial.
141. Insolvency of judgment creditor no ground for relief if set-off might have been urged at law.
142. Open accounts; subsequently acquired set-offs.

§ 136. In accordance with the general principle that equity will not interfere where there is ample remedy at law and where a court of law has first obtained jurisdiction of the subject matter, a judgment will not be enjoined on the ground of off-sets which might have been interposed in defense of the legal action.[2] And where there is no allegation in the bill that the person aggrieved was prevented from using his set-off in the action at law by some unavoidable occurrence, or that he possessed no other evidence by which to establish his set-off than the testimony of the opposite party, an injunction will not be allowed.[3] Nor will equity restrain proceedings under a judgment on the ground of a set-off in respect to distinct and unconnected debts, in the absence of any other circumstances calling for the aid of the court.[4] And where a court of law,

[1] Jones *v.* Jones, N. C. Term R. 110.

[2] Rives *v.* Rives, 7 Rich. Eq. 353; Cummins *v.* Bentley, 5 Ark. 9; George *v.* Strange, 10 Grat. 499; Winchester *v.* Grosvenor, 48 Ill. 517; Cook *v.* Murphey, 7 Gill. & J. 282. But see, *contra*, Hughes *v.* McCoun, 3 Bibb, 254, where it is held that set-off, being matter of equitable as well as legal jurisdiction, and not specially cognizable in a court of law, may be relied upon to enjoin a judgment, even where it was not pleaded at law and no excuse is offered for not pleading it there.

[3] Cummins *v.* Bentley, 5 Ark. 9.

[4] Dade *v.* Irwin's Ex'r., 2 How. 383.

having full jurisdiction of the subject matter and having fully considered the case, has refused to allow a set off, equity will not afterward assume jurisdiction and restrain the judgment.[1]

§ 137. Claims for damages sustained by breach of warranty on the sale of property and for money loaned, which might have been set off in defense of an action at law, afford no ground for restraining proceedings under the judgment in the absence of fraud, accident, or mistake.[2] So too damages resulting from the wrongful attachment of one's property do not authorize an injunction against the judgment, since ample remedy exists at law by proceedings upon the attachment bond.[3]

§ 138. Set-offs which are purely equitable in their nature need not be pleaded at law, and defendant who has not urged them in defense of the action may, after judgment obtained, come into equity and restrain the judgment on establishing his equitable set-offs.[4] But, notwithstanding this apparent exception to the general rule, a judgment will not be enjoined upon the ground of other transactions between the parties upon which there is possibly an equitable set-off.[5]

§ 139. Though equity will not, as we have seen, enjoin proceedings under a judgment on the ground of set-off where the defendant has neglected to avail himself of the opportunity to defend at law, yet if through fraud, collusion, or other improper conduct of the plaintiff, he has been induced to omit his defense, the judgment may be enjoined, defendant in the

[1] Simpson v. Hart, 1 Johns. Ch. 91. Kent, Ch., in passing upon the case, says: "Where courts of law and equity have concurrent jurisdiction over a question and it receives a decision at law, equity can no more re-examine it than the courts of law, in a similar case, could re-examine a decree of the court of chancery. * * * It is the unfitness and vexation and indecorum of permitting a party to go on successively by way of experiment from one concurrent tribunal to another and thus to introduce conflicting decisions, that prevents the second inquiry."

[2] Winchester v. Grosvenor, 48 Ill. 517.

[3] Id.

[4] Richmond etc. v. Shippen, 2 Pat. & H. 327. But see Hudson v. Kline, 9 Grat. 379.

[5] Parks v. Spurgin, 3 Ired. Eq. 153.

action at law having been guilty of no laches on his part.[1] Thus, where a judgment was obtained in violation of a written agreement that complainant's set-off should be credited on the note in suit and that the suit itself should be dismissed an injunction has been allowed.[2] And where defendant in the action at law has a good off-set to the demand, of which he was prevented from availing himself by the fraud and collusion of plaintiffs, unmixed with negligence or laches of his own, a bill alleging these facts is not demurrable for want of equity.[3]

§ 140. Ignorance may sometimes afford sufficient excuse for not having pleaded the set-off in defense of the suit at law. And where a judgment has been recovered against an administrator, who afterward discovers set-offs and credits to which his intestate was entitled, but of whose existence defendant was wholly ignorant at the time of trial, equity will enjoin proceedings under the judgment.[4] But a partial set-off against a judgment can not authorize a court to enjoin the entire amount of the judgment.[5] And when an injunction is granted because of a set-off which is less than the whole amount of the judgment, it should be with the proviso that the judgment creditor may proceed by execution to collect the undisputed balance of his judgment.[6]

§ 141. Insolvency of the judgment creditor will not warrant an injunction against proceedings under his judgment on account of a set-off which might have been urged at law.[7] But where he is indebted to the judgment debtor largely in

[1] Allen *v.* Medill, 14 Ohio, 445; Davis *v.* Tileston, 6 How. 114; Dickenson *v.* McDermott, 13 Tex. 248.

[2] Dickenson *v.* McDermott, 13 Tex. 248.

[3] Davis *v.* Tileston, 6 How. 114.

[4] Terrill *v.* Southall, 3 Bibb, 458. But see, *contra*, Hudson *v.* Kline, 9 Grat. 379, where it is held that, although defendant is prevented by unavoidable accident from availing himself of off-sets in defense of the action at law, he is still not entitled to enjoin the judgment, but must pursue his remedy at law for the recovery of his claims.

[5] Palfrey *v.* Shuff, 2 Mart. N. S. 51.

[6] Hodges *v.* Planters etc., 7 Gill & J. 306.

[7] Rives *v.* Rives, 7 Rich. Eq. 353.

excess of the judgment which he has obtained against him, and refuses to allow his judgment to be set off against such indebtedness, an injunction will be allowed on the ground that the enforcement of payment under such circumstances would be unconscientious and a violation of moral duty.[1]

§ 142. The mere existence of cross demands is not of itself sufficient to constitute an equitable set-off, or to warrant an injunction, and a court of equity will not on the ground of an open and unsettled account between the parties, restrain a judgment creditor from profiting by his judgment.[2] And a set-off or counter demand acquired after verdict, though greater than the amount of the verdict, will not authorize an injunction against the proceedings, since it would be manifestly unjust that plaintiff should be delayed or hindered in obtaining the benefit of his verdict by interposing a claim not yet established at law.[3] But the rule is otherwise if the set-off relied upon as the foundation for the relief has been reduced to judgment, and in such case an injunction may be allowed.[4]

[1] Payne *v.* Loudon, 1 Bibb, 518. It does not appear from the case as reported, whether the set-off was urged as a defense at law.

[2] Rawson *v.* Samuel, 1 Cr. & Ph. 161.

[3] Whyte *v.* O'Brien, 1 Sim. & Stu. 551. "The question," says Eldon, Lord Chancellor, "is whether a bill of this kind can be maintained. At law, where a defendant claims a set-off, the truth of his claim comes to be tried at the same time with the demand raised by the action, and is decided by the same verdict. If, after the verdict, the defendant acquires for the first time a cross demand against the plaintiff, he can not, for that reason, by any proceeding at law, defeat or delay the plaintiff from the benefit of his verdict. It is not reasonable that a cross demand thus subsequently acquired, should delay the plaintiff from the benefit of his verdict, until the validity of this demand is ascertained by a second trial; and in this case equity must follow the law. Equitable set-off is where by reason of the nature of the cross demand, there can be no set-off at law. Here the demand is purely legal."

[4] Williams *v.* Davies, 2 Sim. 461.

IX. Of Judgments as affecting Title.

§ 143. Judicial sales not enjoined for irregularity in proceedings.
144. Sale of property on execution against a third person.
145. Exception to the general rule.
146. Distinction between sales of personal and of real property.
147. Equity will interfere to prevent a cloud upon title.
148. But not if title is good upon its face.
149. Failure of title a ground of injunction against judgment for purchase money.
150. Mere apprehensions of possible failure not sufficient.
151. Fraud and improper conduct of judgment creditor.
152. Writs of restitution and possession.
153. Judgment in another county; ejectment by mortgagee.
154. Prior lien; growing crops.
155. Surety in replevin bond.
156. Of parties.

§ 143. The aid of equity is not unfrequently sought for the purpose of enjoining proceedings under judgments at law against the real estate of the judgment debtor. With reference to such cases, it is to be remarked, in the first instance, that a sale of real estate under legal process will not be restrained on account of defects and irregularities in the proceedings by which judgment was obtained, but some actual injury or apprehension of injury must be shown.[1] Nor will equity interpose to prevent the enforcement of judgments rendered against complainant for the amount of alleged benefit to his property by the opening of certain streets, because of irregularities in the proceedings, the remedy being at law, and equity having no disposition to restrain the proceedings of inferior tribunals of special jurisdiction.[2]

[1] Morgan v. Whiteside's Curator, 14 La. 277; Ewing v. St. Louis, 5 Wal. 413.

[2] Ewing v. St. Louis, 5. Wal. 413. Mr. Justice Field, delivering the opinion of the court, says: "With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere unless it should become necessary to prevent a multiplicity of writs or irreparable injury, or unless the proceeding sought to be

§ 144. Upon the general principle that courts of equity will not entertain jurisdiction where ample remedy exists at law, an injunction will not be allowed against the sale of property levied upon in satisfaction of an execution against a person other than the owner of the property.[1] A distinction, however, is taken between the case where complainants are owners of the legal and where they are owners of the equitable title to the property about to be sold; since in the case of legal ownership the remedy at law is sufficient, but where the title is merely equitable, courts of law are powerless to afford the necessary relief, and equity will entertain jurisdiction to restrain the sale.[2]

§ 145. Notwithstanding the general rule as above laid down, it has been held that the grantor of real estate with covenants of warranty, has such an interest in restraining a sale of the land under a judgment against a former owner, alleged to have been paid, as to make him a proper party to apply for an injunction.[3] But the purchaser of lands can not restrain their sale under a judgment obtained by fraud against his grantor, without showing affirmatively that he will be injured thereby.[4]

§ 146. In the application of the rule, a distinction has been taken between sales of personal and of real property under execution, and it has been held that the owner and lessor of personal property may interfere by injunction to restrain its sale under execution against a third person having no interest

annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases, the review and correction of the proceedings must be obtained by the writ of *certiorari*. This is the general and well established doctrine." See also Mayor etc. *v.* Meserole, 26 Wend. 132; Heywood *v.* Buffalo, 4 Kern. 534.

[1] Freeman *v.* Elmendorf, 3 Halst. Ch. 475, affirmed on appeal, Ib. 655; Watkins *v.* Logan, 3 Monr 21; Bouldin *v.* Alexander, 7 Monr. 425; Coughron *v.* Swift, 18 Ill. 414; Henderson *v.* Morrill, 12 Tex. 1; Carlin *v.* Hudson, Ib. 202; Hall *v.* Davis, 5 J. J. Marsh. 290. But see *contra*, Brummel *v.* Hurt, 3 J. J. Marsh. 709; Downing *v.* Mann, 43 Ala. 266; Bach *v.* Goodrich, 9 Rob. La. 391.

[2] Orr *v.* Pickett, 3 J. J. Marsh. 269.

[3] McCulloch *v.* Hollingsworth, 27 Ind. 115.

[4] Marriner *v.* Smith, 27 Cal. 649.

therein, since complainant, not having the right of possession, might be entirely remediless without the aid of equity.[1]

§ 147. Courts of equity frequently enjoin proceedings under judgments for the prevention of a cloud upon title, and this would seem to follow, by analogy, from the well-settled and recognized jurisdiction of equity to remove clouds upon title. Since, if the court may, for the purpose of preventing litigation and expense, entertain jurisdiction for the removal of a cloud upon the title, it is difficult to perceive any substantial reason why the same jurisdiction may not be exercised to prevent such a cloud. And it may, therefore, be laid down as a general rule that a sale of real estate under execution, which will not, at law, confer any title on the purchaser, and whose only effect will be to cast a cloud upon the title of a *bona fide* purchaser, may be enjoined.[2] Nor in the application of the rule will it avail against the issuing of an injunction that the levy was only made upon the right, title and interest of the complainant.[3]

§ 148. The exercise of the jurisdiction of equity to prevent a cloud upon title, proceeds upon the assumption that the title of the person complaining, being shown as it appears of record, the cloud to be removed or prevented is apparently a good title against that of complainant, though in reality defective by reason of facts *dehors* the record. An injunction will therefore not be allowed to restrain a sale under a judgment in foreclosure to prevent the establishment or assertion of a title which can only be shown to be *prima facie* good by leaving complainant's title out of consideration.[4] So if the invalidity which is charged to be a cloud upon the title appears upon the face of the record itself, as in the case of an award for the partition of lands which is invalid upon its face, equity will not interfere to set it aside.[5] As between two judgment cred-

[1] Ford *v.* Rigby, 10 Cal. 449.

[2] Christie *v.* Hale, 46 Ill. 117; Pettit *v.* Shepherd, 5 Paige, 493; Key etc. *v.* Munsell, 19 Iowa, 305; Bank etc. *v.* Schultz, 2 Ohio, 506; Norton *v.* Beaver, 5 Ohio, 178. But see, *contra*, Coughron *v.* Swift, 18 Ill. 414.

[3] Key etc. *v.* Munsell, 19 Iowa, 305.

[4] Moore *v.* Cord, 14 Wis. 213; Gamble *v.* Loop, Ib. 465.

[5] Meloy *v.* Dougherty, 16 Wis. 269.

itors, where the prior creditor has received full payment and satisfaction of his judgment, but still attempts to enforce executions thereunder to the prejudice of the junior creditor, such a cloud is thereby thrown upon the title to the debtor's estate as will authorize an injunction in behalf of the junior judgment creditor.[1]

§ 149. Failure or want of title is frequently relied upon as the foundation for an injunction against proceedings under a judgment to enforce the collection of the purchase money of real estate, and a complete failure of title is in some cases regarded as ground for an injunction. And where the vendor has stripped himself of all title to the premises, either legal or equitable, and is in no condition to comply with his contract to convey, neither he nor his assignees standing in his stead will be allowed to recover the purchase money, and a judgment therefor will be perpetually enjoined.[2] So where three tracts of land were sold, the title proceeding from three different sources, one of which entirely failed, there being no such tract in existence, and the other tract proved deficient in amount, the judgment for the purchase money was enjoined to the extent of the deficiency in the land.[3] And a distinction is taken between a mere deficiency in quantity and the absolute non-existence of the real estate conveyed; for, while the relief might be denied in the former case, the latter is sufficient to authorize an injunction.[4] But where the vendor, in addition to his failure to give possession of part of the property at the time stipulated, has utterly failed to make any conveyance of the property, an injunction will issue.[5]

§ 150. To warrant the exercise of the jurisdiction in restraint of judgments for purchase money, mere apprehensions of a possible failure of title will not suffice, especially where complainant is still in possession of the premises.[6]

[1] Shaw *v.* Dwight, 16 Barb. 536.
[2] Buchanan *v.* Lorman, 3 Gill. 51.
[3] Strodes *v.* Patton, 1 Marsh. Dec. 228.
[4] Id.
[5] Hilleary *v.* Crow, 1 Har. & J. 542.
[6] Truly *v.* Wanzer, 5 How. 141.

And he who comes into equity for relief against a judgment for unpaid purchase money must himself be free from negligence. Thus, where a purchaser has neglected, during the life time of the vendor, to pay the purchase money and obtain a conveyance, he will not be allowed to enjoin the judgment because of the difficulty of obtaining title from the infant heirs of the vendor, whom he has not made parties to his bill.[1] Where a judgment for purchase money is enjoined until the grantor perfects his title and the writ is then dissolved, damages should not be allowed against complainant for having issued such injunction.[2]

§ 151. Fraud and negligence on the part of the judgment creditor in the enforcement of his lien against the property of his debtor may, under certain circumstances, create an equity sufficient to warrant an injunction against further proceedings under the judgment. Thus, where parties have stipulated in writing that they will not enforce their judgment lien against certain real estate of the judgment debtor, and afterward, in violation of their agreement, attempt its enforcement, they will be restrained by injunction.[3] So where the judgment creditor may collect his judgment from property that his debtor has not conveyed, but refuses or neglects so to do, he will be enjoined from proceeding against the grantee of his debtor.[4] And a subsequent *bona fide* purchaser may enjoin a sale of premises where the lien created by statute in favor of the judgment creditor has expired by lapse of time without sale being had.[5]

§ 152. In general the enforcement of a legal right will not be enjoined in equity, except upon a clear showing of a right superior to that which it is sought to enjoin. Therefore a person in possession of real estate without legal title, has not sufficient equities as against the legal owner to entitle him to an injunction against a writ of restitution which has been

[1] Prout v. Gibson, 1 Cranch, C. C. 389.
[2] Fishback v. Williams, 8 Bibb, 342.
[3] Reily v. Miami etc., 5 Ohio, 333.
[4] Hurd etc. v. Eaton, 28 Ill. 122.
[5] Riggin v. Mulligan, 4 Gilm. 50.

awarded the legal owner for the purpose of obtaining possession of his premises.[1] But a perpetual injunction will be allowed to restrain the execution of a writ of *habere facias possessionem* against complainant's real estate when he was not a party to the litigation.[2] In general, however, questions of title being properly triable at law, equity will not interfere to restrain a sale of real estate under execution, the title to which is in dispute, but will leave the parties to pursue their remedy in a legal forum.[3]

§ 153. The existence of a judgment in another county against the same defendant as garnishee, will not warrant an injunction to prevent the judgment creditors from obtaining their money by a sale of mortgaged premises under a decree in foreclosure against the defendant, since he is not entitled to an injunction against the collection of the money under the decree, unless he alleges satisfaction of the judgment in the other county.[4] Nor will a court of equity before a hearing enjoin a mortgagee who has recovered judgment in ejectment for the mortgaged premises from proceeding with an execution on his judgment.[5] Where, however, a judgment creditor is attempting to enforce his judgment by a sale of real estate conveyed in trust by the judgment debtor before the debt was incurred, an injunction may be granted against the proceedings until the question of whether the trust was created in fraud of creditors is settled.[6]

§ 154. One who holds a prior lien on lands can not enjoin a subsequent judgment creditor from attempting the enforcement of his judgment by execution; and this for the reason that a sale under such execution can not defeat or impair the prior lien, but would leave it in the same condition as if such sale had never taken place.[7] But purchasers at a foreclosure

[1] Boinay *v.* Coats, 17 Mich. 411.

[2] Goodnough *v.* Sheppard, 28 Ill. 81.

[3] Freeman *v.* Elmendorf, 3 Halst. Ch. 475, affirmed on appeal to the Court of Errors and Appeals, Ib. 655.

[4] Dunham *v.* Collier, 1 Greene, Iowa, 54.

[5] Todd *v.* Pratt, 1 Har. & J. 465.

[6] McCann *v.* Taylor, 10 Md. 418.

[7] Union etc. *v.* Poultney, 8 Gill & J. 324.

sale, being entitled to the then growing crops, may restrain the creditors of the mortgagor from proceeding under execution to levy upon such crops, the doctrine of emblements having no application to purchasers under a foreclosure.[1]

§ 155. A surety in a replevin bond is not entitled to an injunction to prevent the levy of an execution on his own property until that of his principal shall have been levied upon, such a proceeding for the purpose merely of saving the property of the surety by compelling a levy upon that of the principal, being regarded as without the sanction of either principle, practice, or authority.[2]

§ 156. A commissioner in chancery may, in a proper case, be restrained from executing a sale of lands under a decree, he being regarded as a sheriff under the same circumstances.[3] But the court can not, in an injunction against a decree, inquire into the rights of parties existing antecedent to the rendering of the decree, and which might have been inquired into at that time.[4]

X. Of the Court in which the Judgment was rendered.

§ 157. Cases of concurrent jurisdiction; of inferior and superior courts.
158. State and United States courts.
159. Rule as between courts of different states.
160. Court may restrain party from enforcing judgment in another state.
161. Equity will not enjoin its own proceedings.

§ 157. Questions of importance frequently arise touching the relative jurisdiction and powers of the court in which the judgment is obtained and of that in which it is sought to be enjoined. In so far as courts of law and equity have concurrent jurisdiction over the same matters, a party seeking relief may make his election in which tribunal he will bring his

[1] Crews v. Pendleton. 1 Leigh, 297.
[2] Kilpatrick v. Tunstall, 5 J. J. Marsh. 80.
[3] People etc. v. Gilmer, 5 Gilm. 242.
[4] Id.

action.[1] And, as a general rule, one court will not interfere with or enjoin the judgment of another court of concurrent jurisdiction capable of granting the necessary relief.[2] So an inferior court will not, in general, enjoin the proceedings of its superior court, since this would be to make the inferior paramount to the superior tribunal.[3] If, however, the mandate or order of the superior court has been improperly or surreptitiously obtained, its enforcement may be enjoined by an inferior tribunal whenever the judgment or decree of an inferior court would be enjoined upon similar grounds.[4] And a court of equity, though not a court of last resort, may restrain the execution of a decree of such court where it satisfactorily appears that the decree has been satisfied, and where, notwithstanding such satisfaction, the person in whose favor the decree was obtained is proceeding to enforce it by execution.[5]

§ 158. The state courts will not trespass upon the clearly established jurisdiction of the United States courts, and will not grant injunctions against judgments rendered in those courts. Whatever grounds of equitable relief may exist against such judgments should be urged in the United States courts themselves.[6] Especially will the state courts refuse to interfere where the jurisdiction is expressly conferred by law upon the federal courts, as in the case of a judgment for infringement of a patent.[7] While courts of the United States will not generally interfere with or restrain the proceedings of the state courts, being forbidden by statute from so doing,[8] yet the statute is held inapplicable to a case where, under process of a

[1] Conway *v.* Ellison, 14 Ark. 360.

[2] Platto *v.* Deuster, 22 Wis. 482; Grant *v.* Quick, 5 Sandf. 612; Goodale *v.* Scannell, 8 Cal. 27; Rickett *v.* Johnson, Ib. 85; Chipman *v.* Hibbard, Ib. 268; Gorham *v.* Toomey, 9 Cal. 77; Uhlfelder *v.* Levy, Ib. 607.

[3] Roshell *v.* Maxwell, Hemp. 25.

[4] Bank etc. *v.* Hancock, 6 Dana, 284.

[5] McClellan *v.* Crook, 4 Md. Ch. 398.

[6] McKim *v.* Voorhies, 7 Cranch, 279; Kendall *v.* Winsor, 6 R. I. 453; English *v.* Miller, 2 Rich. Eq. 320.

[7] Kendall *v.* Winsor, 6 R. I. 453.

[8] Act of Congress of 1793, 1 Stat. at Large, 334.

state court, a levy has been made upon property belonging to a person other than the defendant in execution, since such unauthorized levy is regarded as in no sense a proceeding of the court from which the process issued.[1] Even where the state has provided by action at law in the state courts a remedy which equity alone could have given before the statute, the courts of the United States will not thereby be deprived of their jurisdiction in such a case.[2] As regards the jurisdiction of the federal courts to restrain proceedings under a judgment in those courts, the fact that the process of the court in the injunction suit was served on defendant without the district in which the court is situated, does not oust it of jurisdiction and constitutes no ground for withholding an injunction.[3]

§ 159. The courts of one state will not relieve against a judgment recovered in another state on the ground of alleged irregularities in the proceedings in the suit in such other state, since such objections should have been urged upon the former trial at law.[4] But it has been held that an injunction may be granted to stay proceedings under a judgment in an action of debt brought upon the judgment of another state upon a bill charging injustice in the former judgment.[5] So an injunction will lie to restrain proceedings under a judgment of a foreign state which has been reversed, complainant himself having been guilty of no laches.[6]

§ 160. Where actions at law are brought in two different states against the same defendant for the same cause of action, and a judgment is obtained in one state which defendant satisfies in full, and he is led by the fraudulent representations of plaintiff to believe that the action at law in the other state will not be prosecuted against him, and thereby makes no defense to such action, he is entitled to an injunction in the former state to restrain plaintiff at law from collecting his

[1] Cropper v. Coburn, 2 Curtis, 465.
[2] Id.
[3] Logan v. Patrick, 5 Cranch, 288.
[4] Lucas v. Bank etc., 2 Stew. 280.
[5] Wilson v. Robertson, 1 Overton, 266.
[6] McJilton v. Love, 13 Ill. 486.

judgment in the latter. In such case equity acts upon the conscience of the defendant *in personam*, and not upon the courts of the state in which the action is pending.[1]

§ 161. It may be stated as a general rule that equity will not enjoin its own proceedings and that a decree of a court of equity will not be restrained. The rule is based upon the

[1] Engel *v.* Scheuerman, 40 Geo. 206. "This bill is not filed," say the court, Warner, J., "for the purpose of *restraining the proceedings of the court* of New York; the courts of this state have no jurisdiction to do that; nor would the courts of this state have jurisdiction to enjoin the enforcement of a judgment obtained in the courts of New York, between citizens of that state, *resident there*. The question here is, whether a court of chancery, in this state, has jurisdiction to restrain the *personal action of the defendant*, so far as to prohibit him from enforcing the collection of the judgment obtained in the courts of New York, according to the facts of this case. There is a clear distinction as to the power and authority of a court of equity, in this state, to restrain by injunction the *proceedings of a court* in another state, and the power and authority of such court to restrain by injunction the *personal action of a citizen of this state*. In the one case, a court of equity, in this state, has no jurisdiction; in the other, it has jurisdiction to restrain by injunction the *personal action* of the defendant himself from enforcing an *unconscientious* demand in another state, whether that demand is reduced to judgment or not, upon a proper case being made. The record, now before us, in our judgment, makes such a case. The defendant *voluntarily* came into the courts of this state in the first instance, to have his claim adjudicated, and that claim has been adjudicated therein, paid off and discharged. We are not aware that comity between the several states of the Union, requires that the courts of this state shall *assume* that the courts of the State of New York are any more competent to hear and decide the defendant's claim, and to do him justice, than are the courts of this state, to the jurisdiction of which he voluntarily submitted the same for adjudication in the first instance. In restraining him, by injunction, from enforcing this unconscientious demand, in the State of New York, the court acts upon his conscience *in personam* and not upon *the courts* of that state; the person of the defendant is within the jurisdiction of the court, the proceedings of the courts in the State of New York are not, and we do not interfere with them. The Supreme Court in New York, in which the judgment was obtained, has no interest in the enforcement of that judgment, the defendant has; and a court of equity, in this state, having jurisdiction of his *person*, will restrain him from making that interest available, when it would be against *conscience* and the principles of equity that he should do so. In the language of the Master of the Rolls, in Cranstown *v.* Johnston, this court will not permit the defendant to avail himself of the law of any other country, to do what would be *gross injustice*."

obvious reason that by enjoining its own decrees the court would thereby declare that to be improper and wrong which it had previously declared to be proper and right.[1] Nor will one court of chancery interfere with or restrain the proceedings of another of the same jurisdiction.[2] But judgments at law on notes executed for the purchase money of estates sold under a decree in chancery may be enjoined in the court of chancery in which the original proceedings were pending.[3]

XI. Of Injunctions against Awards.

§ 162. Judgment on award rarely enjoined.
163. Special cases.
164. Laches will bar relief against judgment on award.

§ 162. An injunction will rarely be allowed against the enforcement of a judgment made upon an award of arbitrators, since objections to the regularity of the proceedings can and usually should be made at law. And in the absence of any allegation of fraud, accident, or mistake, the relief will be withheld.[4] Even where it is alleged that the award was obtained by fraud and corruption, an injunction will not be allowed where the grounds relied upon could have been urged as a defense to the suit at law brought upon the award.[5] Where, however, the fraudulent and improper conduct of the arbitrators can only be made to appear by evidence *dehors* the award, and which can not be pleaded to the action at law, the rule is otherwise. And where, after the hearing before the arbitrators was closed, they received statements from one of the parties, unknown to the other, and containing different items relative to his claim, an injunction may be granted.[6]

[1] Greenlee v. McDowell, 4 Ired. Eq. 481.
[2] Deaderick v. Smith, 6 Humph. 188.
[3] Id.
[4] Jones v. Frosh, 6 Tex. 202; Emerson v. Udall, 13 Vt. 477.
[5] Snediker v. Pearson, 2 Barb. Ch. R. 107.
[6] Sisk v. Garey, 27 Md. 401.

§ 163. Allegations that arbitrators exceeded the scope of their authority and that complainant had not sufficient notice of the time and place of their meeting, will not warrant an injunction against the judgment where such facts might have been urged in defense of the action at law upon the award.[1] And where the invalidity relied upon as the foundation for the relief appears on the face of the proceedings no injunction will be allowed.[2] So equity will not disturb by injunction an award in favor of a private citizen against a town where it does not appear that any great or irreparable injury is done the town, and where the person in whose favor the award was made would be subjected to great hardship and injustice should the injunction be granted.[3]

§ 164. One who seeks relief in equity against an award must show due diligence in making his application and must come into court with clean hands. And where complainant has been guilty of laches in the assertion of his right, or where his own conduct has not been free from blame, he will be refused relief.[4]

XII. Of Judgments by Default and Confession.

§ 165. Injunction rarely allowed against judgment by default.
166. Rarely allowed against judgment confessed.
167. Judgment confessed on contingent liability; judgment confessed by a municipal corporation.

§ 165. In the absence of fraud or deception an injunction will rarely be allowed against a judgment which complainant has suffered to go against him by default.[5] And where one has negligently permitted judgment to go against him by default, such negligence is sufficient to prevent him from

[1] Emerson v. Udall, 13 Vt. 477.
[2] Meloy v. Dougherty, 16 Wis. 269.
[3] Hine v. Stephens, 33 Conn. 497.
[4] Jones v. Bennett, 1 Bro. P. C. 528; Smith v. Whitmore, 1 H & M. 576.
[5] Murdock v. De Vries, 37 Cal. 527; Sohier v. Merril, 3 Woodb. & M. 179.

obtaining the aid of an injunction against the judgment.[1] Indeed, in a case of default, a court of equity will refuse to consider the merits of the case any further than the question of complainant's negligence in asserting his rights at law, and no sufficient excuse appearing for his having neglected to defend at law, the injunction will be refused.[2] Nor will the proceedings be enjoined merely because plaintiff obtained more relief than he was entitled to by his action, there being no misrepresentation or deception by which defendants were in any way misled.[3] And in the absence of fraud or collusion an injunction will not be continued against a judgment at law by default where no real defense could have been made to the action, either at law or in equity.[4]

§ 166. With regard to judgments by confession, as in the case of judgments by default, a court of equity will not ordinarily interfere in the absence of fraud or collusion. And where defendant has voluntarily and freely confessed judgment, without fraud or deception by the opposite party, he is thereby estopped from enjoining the proceedings on the ground of an equity existing anterior to his confession of judgment.[5] Where, however, an injunction was granted against the sale of real estate under an execution, upon a bill charging defendant with having confessed the judgment collusively in order to prevent complainant from realizing his prior judgment out of the real estate, the bill was held good upon demurrer.[6]

§ 167. It is held that a judgment upon a warrant of attorney to secure a contingent liability is not void as between the parties thereto and its execution will not be restrained because of a defect in the verification of the pleadings.[7] And where the common council of a city, acting in good faith,

[1] Faulkner v. Campbell, Morris, Iowa, 148; Mason v. Richards, 8 Gilm. 25.

[2] Faulkner v. Campbell, Morris, Iowa, 148.

[3] Murdock v. De Vries, 37 Cal. 527.

[4] Sohier v. Merril, 3 Woodb. & M. 179.

[5] Moore v. Barclay, 23 Ala. 789.

[6] Oakley v. Young, 2 Halst. Ch. 453.

[7] Reiley v. Johnston, 22 Wis. 279.

have directed the confession of a judgment in a suit against the city upon a demand the larger portion of which is justly due, an injunction will not be allowed in behalf of a tax payer of the city to restrain the collection of the judgment. Even if equity has jurisdiction to restrain the action of a municipal corporation in such case, a clear and substantial injury to the public interest must be shown before the injunction will be allowed.[1]

XIII. Special Cases.

§ 168. Failure of consideration; when not sufficient.
169. When sufficient.
170. Injunction of judgment pending proceedings in bankruptcy.
171. Where judgment is paid in part.
172. Sureties.
173. When injunction becomes operative.
174. Judgments in ejectment and forcible entry and detainer.
175. New trial.
176. Death of parties.
177. Judgments on promissory notes.
178. Mistake or negligence of counsel; no ground for restraining judgment.
179. Cases where government is a party.
180. Cases where part of judgment is justly due.
181. Special cases.
182. Two executions on same judgment; execution prematurely issued.
183. Limit of jurisdiction; alternative judgment in replevin.
184. Relief as between different judgment creditors.
185. Mortgage of railroad.
186. Heirlooms.
187. Sale of complainant's property under execution against another may be enjoined.
188. Cases where equities relied upon can not be urged at law.
189. Effect of injunction against judgment.
190. Judgment against sureties, when enjoined.
191. Judgment against administrator, when enjoined.
192. Effect of statute.
193. Effect of statute.

[1] Chaffee v. Granger, 6 Mich. 51.

194. Effect of failure to answer.
195. Effect of appeal; bringing money into court.
196. Refusal of matters within discretion of court of law no ground of injunction; trifling errors no ground.
197. Defects curable at law.
198. Breach of trust.
199. When creditor may be put to his election.
200. Mechanic's lien, when protected.
201. Effect of injunction to restrain sheriff from paying money realized on levy.
202. Good will of trade.
203. Judgment in slander, when enjoined.
204. Equity will not restrain proceedings upon injunction bond after dissolution.
205. Dissolution.
206. Damages on dissolution.
207. Effect of dissolution as to judgment enjoined.

§ 168. Failure of consideration is sometimes relied upon as a ground for enjoining proceedings under judgments, but the jurisdiction in this class of cases is somewhat sparingly exercised. Thus, in the absence of fraud an injunction will not be granted against a judgment obtained on a contract under seal, upon the ground that the contract was merely voluntary and without consideration, the rights of purchasers and creditors not coming in question.[1] So a failure to perform the covenants in a deed, which covenants were the consideration for the giving of a note, does not constitute sufficient equity to warrant a court in enjoining a judgment upon the note in favor of a third person to whom it had been transferred.[2]

§ 169. A court of equity may enjoin a judgment on an assigned note because of failure of consideration, where the facts limiting the right of recovery are complicated and inappropriate for the determination of a jury, even though the defense was not made at law.[3] And where, in a suit prosecuted to a court of last resort, the makers of a promissory note were held not liable on the ground of illegality of con-

[1] Stubblefield *v.* Patterson, 1 Hayw. Tenn. 128.
[2] Gridley *v.* Tucker, Freem. Ch. 209.
[3] Reese *v.* Walton, 4 B. Mon. 507.

sideration, an accommodation indorser was allowed to enjoin a judgment against him on the same note, even though he had not shown diligence in defending at law. In such case the accommodation indorser is regarded in the light of a surety, and his principal being discharged the surety should also be discharged.[1]

§ 170. It has been held that after a decree in bankruptcy, and pending proceedings for a final discharge, the state courts have jurisdiction to restrain the coercive sale under judgment of the bankrupt's property acquired after the assignment, the judgment having been obtained upon a debt provable in bankruptcy.[2]

§ 171. Failure to credit part payment on a judgment will not warrant an injunction restraining the enforcement of the entire judgment.[3] And where a judgment has been enjoined because of payments having been made for which no credit is given, and defendant in his answer admits a partial payment, the injunction will be made perpetual as to such amount and will be dissolved as to the balance yet due.[4] So if the judgment debtor, during the pendency of the injunction, should pay a portion of the judgment enjoined, the injunction will be made perpetual as to the amount paid.[5]

§ 172. It is held that one surety can not by injunction restrain proceedings at law by his co-surety for contribution unless he tenders the amount due the co-surety who has paid the debt, or alleges his readiness to pay.[6] But an injunction which has been granted for the purpose of protecting complainant from a sale of his property to satisfy a debt for which he was surety, will not be dissolved because of a statute giving the court out of which execution issued the power of administering equitable relief in such cases. The conferring of equitable powers upon courts of common law does not impair or abridge the jurisdic-

[1] Miller v. Gaskins, Sm. & M. Ch. 524.
[2] Turner v. Gatewood, 8 B. Mon. 613.
[3] Cobb v. Hynes, 4 La. An. 150.
[4] Perry v. Kearney, 14 La. An. 401.
[5] Tapp v. Beverley, 1 Leigh, 80.
[6] Craig v. Ankeney, 4 Gill. 225.

tion of the court of equity; the only result is to create a case of concurrent jurisdiction.[1]

§ 173. It has been held that an order for an injunction to restrain a sale under execution, does not become operative to stay proceedings under the execution until complainant has complied with the terms of the order by giving the necessary bond and security.[2] And it is considered no contempt of court in such case to proceed with the sale, notwithstanding plaintiff in execution was apprised of the order for the injunction.[3]

§ 174. A judgment in ejectment will not be enjoined upon grounds which might have been used as a defense to the action at law.[4] Nor will an injunction be granted to restrain the execution of a judgment in forcible entry and detainer against a husband for land claimed by the wife as her separate estate, on the ground that she was not a party to the proceedings.[5]

§ 175. A judgment will not be restrained upon grounds which had been relied upon in a motion for a new trial and which had there been held insufficient.[6] Nor will an injunction be allowed for the purpose of a new trial where complainant has already obtained a new trial at law, but through his own negligence has lost the opportunity of making his defense.[7]

§ 176. The pendency of an injunction to a judgment at law will not in case of the death of the defendant in the action at law prevent the revival of the judgment against his personal representatives. The object of the injunction being to prevent the enforcement of the judgment by execution until the equities of the case can be decided, a simple revival of the judgment will not prejudice complainant.[8] But a judgment will not be enjoined because of the death of plaintiff in the action before it was obtained in his name, and a bill filed

[1] Irick *v.* Black, 2 C. E. Green, 189.
[2] Clarke *v.* Hoome's Ex'rs. 2 Hen. & M. 23.
[3] Id.
[4] Agard *v.* Valencia, 39 Cal. 292.
[5] Saunders *v.* Webber, 39 Cal. 287.
[6] Matson *v.* Field, 10 Mo. 100.
[7] Dodge *v.* Strong, 2 Johns. Ch. 228.
[8] Richardson *v.* Prince etc., 11 Grat. 190

for this purpose is demurrable by the legal representatives of the deceased. The error being merely an error in fact constitutes no sufficient equity to sustain an injunction.[1]

§ 177. As an exception to the general rule denying relief against a judgment where the defense should have been interposed at law, an injunction has been granted against a judgment in favor of the assignee of a note on the ground of fraud and misrepresentation in the value of the article which was the consideration for the note, the assignee having taken the note with notice.[2] But a court of equity will not enjoin a judgment in favor of an assignee of a note for valuable consideration, who is ignorant of complainant's equities when he takes the note, even though such equities might warrant an injunction against the payee.[3]

§ 178. We have already seen in the preceding sections that one's ignorance or mistake of law will afford no sufficient reason for restraining a judgment against him. The operation of the rule is not confined to the case of a party's own ignorance, but in conformity with the maxim *qui facit per alium facit per se*, ignorance or mistake on the part of counsel employed in a cause will not authorize an injunction against the judgment.[4] So in the absence of fraud mere negligence on the part of an attorney retained to defend a suit is not sufficient ground for the interference of equity to restrain a judgment.[5] Nor will the abandonment of a cause by an attorney warrant an injunction against the judgment where other counsel were employed and a trial had, there being no allegations of fraud.[6]

§ 179. A bill in equity will not lie against the United States to enjoin proceedings under a judgment that has been

[1] Williamson's Adm'r. *v.* Appleberry, 1 Hen. & M. 206.

[2] King *v.* Baker, 1 Yerg. 450.

[3] Donelson *v.* Young, Meigs, 155.

[4] Shricker *v.* Field, 9 Iowa, 366; Winchester *v.* Grosvenor, 48 Ill. 517.

[5] Wynn *v.* Wilson, Hemp. 698. But in a subsequent application to the court for an injunction in the same cause, fraud being shown in the assignment of the notes on which the judgment was founded, the relief was allowed. See note to same case.

[6] Winchester *v.* Grosvenor, 48 Ill. 517.

paid, since the government is not liable to be sued except with its own consent given by law. But upon a proper showing in such case a stay of proceedings may be had until an investigation can be made of the facts.[1] Nor will an injunction be allowed in favor of the United States, in the absence of fraud, to restrain a sale of vessels on execution on the ground that they may possibly be taken beyond the jurisdiction and the claim of the government be thereby endangered.[2]

§ 180. In the exercise of the jurisdiction in restraint of proceedings at law, the courts enforce a rigid application of the rule that he who would have equity must do equity. Where, therefore, complainants admit their indebtedness to defendant to the full amount of the judgment, they will not be allowed an injunction without tendering payment.[3] And where complainant, seeking to restrain a judgment against himself, admits that he owes a balance to defendant on account of the same matter, equity may require such balance to be brought into court and paid accordingly.[4] And in no event should an injunction be allowed against more of the judgment than is shown to be unjust and unconscionable.[5] Where the circumstances of the case require it, the injunction will be dissolved as to a part and continued as to the residue.[6] And where part only of a judgment has been enjoined, the residue stands as if it were the original, and draws interest from the date of the judgment.[7]

§ 181. It has been held that a judgment on a note barred by the statute of limitations, which was properly pleaded, may be enjoined until a hearing where complainant was sick and his counsel absent at the time of taking judgment, judgment having been confessed by one not the attorney of complainant,

[1] United States v. McLemore, 4 How. 286; Hill v. United States, 9 How. 386.

[2] United States v. Collins, 4 Blatch. 142.

[3] Overton v. Stevens, 8 Mo. 622.

[4] Flickinger v. Hull, 5 Gill, 60.

[5] Duncan v. Morrison, Breese, 118.

[6] Lyles v. Hatton, 6 Gill & J. 122.

[7] Copeland's Adm'r. v. Reese, Wright, O. 728.

and without authority in the premises.[1] And where property has been illegally taken in execution under a judgment, which is not subject to the lien of the judgment, as in the case of individual property of a member of a school district to satisfy a debt of the school district, its sale under execution may be enjoined.[2] So a mortgagee who has sold property mortgaged to him as security for a note, will be restrained from proceedings upon his judgment until an account can be had.[3] When an injunction is served upon a sheriff restraining an execution in his hands it is his duty to note the fact upon the execution, and to desist from all further proceedings, without however releasing the levy.[4]

§ 182. The issuing of two executions upon the same judgment does not authorize the interposition of equity, since the party aggrieved can find sufficient remedy at law.[5] Nor will the fact that an execution has issued prematurely entitle the defendant in execution to have an injunction against it perpetuated if the judgment creditor would be entitled to another as soon as the first is perpetually enjoined.[6]

§ 183. Where by statute a minimum amount is fixed as a limit, under which the courts have no jurisdiction, equity will not restrain the collection of a judgment for less than that amount.[7] But where a judgment in replevin is in the alternative form, that is for the return of the property, or, in default thereof, for the recovery of pecuniary damages, if a tender of the property replevied is made within a reasonable time the judgment creditor may be enjoined from enforcing by execution the alternative judgment for money.[8] Equity will not, however, restrain the enforcement of a judgment because there are two funds from which it may be realized, since the

[1] Cheek v. Taylor, 22 Geo. 127.
[2] Kenyon v. Clarke, 2 R. I. 67.
[3] Craft v. Bullard, Sm. & M. Ch. 866.
[4] Pettingill v. Moss, 3 Minn. 222.
[5] Elliott v. Elmore, 16 Ohio, 27.
[6] Dayton v. Commercial etc., 6 Rob. La. 17.
[7] Breckenridge v. McCormick, 43 Ill. 491.
[8] McClellan v. Marshall, 19 Iowa, 561.

creditor has an undoubted right to pursue his remedy in each case until he obtains satisfaction of his debt.[1]

§ 184. Though a general creditor whose claim has not been reduced to judgment is not entitled to the aid of equity to prevent the disposition or control of his debtor's property, yet when he has established his claim by a judgment at law the relation which he sustains toward the debtor is entirely different and may, under certain circumstances, warrant the interference of a court of equity. For example, an execution creditor is entitled to an injunction to restrain his debtor and a prior execution creditor from making any disposition of the debtor's personal property levied upon in satisfaction of the first judgment unless by sale under the first execution; and such relief will be continued until complainant's debt is satisfied.[2]

§ 185. Where a railroad company has mortgaged its road and equipments to secure an indebtedness, the mortgagees will not be allowed to enjoin a judgment creditor from satisfying his judgment out of the personal property of the road on the ground that its possession is necessary to enable the company to pay the mortgage, it not appearing that the property remaining after such levy would be insufficient.[3] But a judgment followed by a levy upon lands with notice of a superior equitable title outstanding may be enjoined on payment of the costs at law.[4]

§ 186. An injunction will not be granted to prevent the levy of an execution on certain articles of property on the ground that they are family heirlooms, such as pictures, relics and gifts from deceased friends, where there is no tender of the value of the articles.[5] Nor in such case is the right to an injunction strengthened by the fact that complainant has more than enough property aside from the articles in question to satisfy all his debts.[6]

[1] Muscatine v. Mississippi, 1 Dillon C. C. 536.
[2] Edgar v. Clevenger, 1 Green Ch. 258.
[3] Coe v. Knox etc., 10 Ohio St. 412.
[4] Gutshall v. Salsberry, Wright, 127.
[5] Johnson v. Connecticut etc., 21 Conn. 148.
[6] Id.

§ 187. A levy under an execution against third persons upon property owned *bona fide* by complainant and which constitutes his stock in trade, presents such elements of apprehended damage and injury as are not susceptible of relief by action at law and constitutes sufficient ground for an injunction.[1] And where one's property is being taken in execution to satisfy the debt of another, equity may interfere for the purpose of retaining the property *in specie*, notwithstanding the remedy at law for the recovery of the property or of damages for its detention. The jurisdiction is akin to that entertained by courts of equity to compel a performance of contracts *in specie*, and is founded upon the necessity of protecting property rights where courts of law afford at best but uncertain and insufficient reparation in damages.[2]

§ 188. While as a general rule courts of equity withhold their aid when ample redress may be had in a legal tribunal, it may sometimes happen that the equities relied upon for an injunction can not be asserted in a court of law and a departure from the rule becomes necessary in order to give complete relief. Thus, where the foundation of a bill to enjoin a judgment is an agreement of such a nature that it could not have been urged in defense of the action at law, equity may properly

[1] McCreery *v.* Sutherland, 23 Md. 471.

[2] Wilson *v.* Butler, 3 Munf. 559. The grounds of the jurisdiction in such cases are well set forth in the opinion of the court as follows: "Although a party whose property is taken in execution to satisfy the debt of another may proceed to recover that property or damages for the taking and detaining thereof in a court of law; and although it is competent to a sheriff having doubts as to the title of the property taken in execution to demand from the creditor an indemnifying bond pursuant to the act in such case made and provided, yet neither of those remedies are in exclusion of a proceeding in equity having for its object the retention of the property *in specie*. Every argument on which the jurisdiction of the courts of equity to compel a performance of a contract *in specie* is founded, is supposed to hold with equal force at least in favor of retaining a subject of property which another, having no title thereto, claims to arrest and dispose of by means of an execution, rather than turn the rightful owner round to seek an uncertain and inadequate reparation in damages." And see Walker *v.* Hunt, 2 West Va. 491; Ford *v.* Rigby, 10 Cal. 449; McCreery *v.* Sutherland, 23 Md. 471. But see, *contra*, Lewis *v.* Levy, 16 Md. 85; Freeland *v.* Reynolds, Ib. 416.

interfere and enjoin the enforcement of the judgment.[1] So a sale of complainant's personal property under an execution against another person will warrant the interference of equity, where complainant's title to the property is such as to prevent its being followed in the hands of purchasers, and such that an action of trespass can not be maintained against the officers or the plaintiffs in execution.[2] But where a person, not a party to the proceedings at law, asks to enjoin a sale of personal property under an execution on the ground of a prior incumbrance upon the same property, the court will not interfere.[3]

§ 189. An injunction restraining defendant and all other persons from the sale of personal property until further order of the court is sufficient to prevent a sale of the property in satisfaction of an execution against defendant, even though the execution be in favor of a person not a party to the bill.[4] And the effect of an injunction upon a judgment subsequently obtained in violation thereof is to render such judgment null and void, and proceedings at law for its enforcement may be enjoined.[5] But a judgment will not be enjoined because complainants have instituted another suit at law against the judgment creditor to recover unliquidated damages upon a contract, unless such judgment creditors are shown to be insolvent, or unless other ground exists for believing that the damages to be recovered will not be realized.[6]

§ 190. It is a well-settled principle in equity that the granting of time or other indulgence to a principal debtor in pursuance of a valid agreement to that effect operates as a discharge of the surety.[7] It follows therefore that a court of equity will, under such circumstances, interfere to restrain proceedings at law against the surety for the collection of the

[1] Hibbard *v.* Eastman, 47 N. H. 507.

[2] Anderson *v.* Biddle, 10 Mo. 28.

[3] Bowyer *v.* Creigh, 3 Rand. 25. See also as to incumbrances, Walker *v.* Hunt, 2 West Va. 491.

[4] West *v.* Belches, 5 Munf. 187.

[5] Collins *v.* Fraiser, 27 Ind. 477.

[6] Boone *v.* Small, 3 Cranch C. C. 628.

[7] 2 Story's Eq. § 883; Clarke *v.* Henty, 3 Y. & C. 187.

debt.[1] And where a creditor has entered into an agreement with his principal debtor for forbearance to sue, and afterward and notwithstanding such agreement he obtains judgment against the sureties without their being notified of the contract of indulgence, such judgment will be perpetually enjoined on the application of the sureties.[2]

§ 191. The aid of equity may be properly invoked to restrain the enforcement of a judgment against an administrator, the proceedings being had against him in his capacity of administrator, where there are no assets in his hands for its satisfaction.[3] And where an injunction has been allowed in such a case it will be continued until such time as sufficient assets come into the hands of the administrator to satisfy the judgment in whole or in part, reserving to the judgment creditor the right to show such assets by a *sci. fa.*[4]

§ 192. Where it is provided by statute that no injunction shall issue on the application of defendant to stay proceedings at law in a personal action after verdict or judgment, unless the amount of the verdict or judgment be paid into court, such statute applies as well to a bill of interpleader which prays an injunction as to other cases.[5] Nor is such statute limited in its operation and effect to the same suit in which the judgment is recovered, its true intent being that one who has obtained a judgment shall not be hindered in any proceedings which he may afterward take for its enforcement, whether by another suit upon the judgment, or otherwise.[6]

§ 193. Where by statute a sheriff has ample remedy at law in case of proceedings brought against him for selling property on execution to which there are conflicting rights, and where he is not obliged to proceed without being indemnified for such damages as he may sustain, he will not be permitted to enjoin proceedings at law brought against him for having sold

[1] 2 Story's Eq. § 883, and cases cited.
[2] Armistead v. Ward, 2 P. & H. 504.
[3] Haydon v. Goode, 4 Hen. & M. 460.
[4] Id.
[5] Morris etc. v. Bartlett, 2 Green Ch. 9.
[6] Kinney v. Ogden's Adm'r., 2 Green Ch.168.

property the title to which is in dispute.[1] It is to be observed, however, that a statute providing for the taking of an indemnifying bond by the officer making a levy, does not preclude a third person claiming to be the owner of the property levied upon from his right to an injunction where the remedy at law is incomplete.[2] A distinction is, however, to be observed between the case of one claiming as an incumbrancer and as owner of the property; and while the relief will not be granted in favor of an incumbrancer, the real owner of the property may receive the aid of equity.[3]

§ 194. Where in a suit for an injunction against a judgment defendant fails to answer a most material charge in the bill and one on which complainant's equity mainly depends, such admission will be taken as a tacit acknowledgment of the equity of the bill. In such case the relief is properly granted as upon a bill *pro confesso*.[4] But an agreement by a third person, not a party to the record, with the judgment debtor that he will pay the execution does not constitute sufficient ground to warrant an injunction against the execution.[5]

§ 195. Pending an appeal from a court of chancery to a higher court on an order dissolving an injunction against judgments at law, it is improper for appellees to proceed to execute their judgments. Should such an attempt be made the court may properly issue an order to show cause why an attachment should not issue for contempt.[6] But where proceedings under a judgment have been enjoined the amount of the judgment restrained need not be brought into court unless it appears that there is danger of insolvency.[7]

§ 196. We have already seen in a previous portion of this chapter that courts of equity will not generally interfere with proceedings at law on the ground of irregularities or even

[1] Storrs v. Payne, 4 Hen. & M. 506.
[2] Walker v. Hunt, 2 West Va. 491.
[3] Id; Bowyer v. Creigh, 3 Rand. 25.
[4] Page's Ex'r. v. Winston's Adm'r., 2 Munf. 298.
[5] Triplett v. Turner, 2 J. J. Marsh. 476.
[6] Turner v. Scott, 5 Rand. 332.
[7] Rodgers v. Rodgers, 1 Paige, 426.

errors in such proceedings. And where a court of law has refused an application which was addressed largely to its discretion, equity will not for this reason interfere. Thus, the refusal to grant a motion for a continuance based upon affidavit will not authorize an injunction against the judgment.[1] Nor will the fact that trifling errors have been committed in assessing the costs of a judgment afford any ground for enjoining the execution.[2]

§ 197. Where the ground relied upon in support of a bill for an injunction against a sale under judgment consists in certain alleged irregularities and defects in the proceedings of the sheriff, which are exclusively within the cognizance of the court from which the execution issued and in which the proceedings were had, and it is entirely competent for that court to give relief by setting aside the sale upon motion, equity will not entertain jurisdiction by injunction.[3]

§ 198. A purchaser at a sale made by a trustee under a trust to pay debts, who is also one of the creditors secured in the trust, and who gives bonds for the payment of the purchase money of the property purchased by him at such sale, can not enjoin the collection of a judgment upon such bonds merely because he is a creditor to a larger amount than he is a debtor, since this would defeat the very object of the trust which is to secure the creditors.[4]

§ 199. A creditor who obtains an injunction against a judgment confessed by his debtor on the ground of fraud, and who then proceeds with an action at law against the debtor, obtains judgment and issues execution, will be put to his election whether to stay execution during the continuance of the injunction, or to consent to a dissolution; and if he refuses to elect the court will dissolve the injunction.[5] The effect of continuing an injunction under such circumstances would be

[1] Western v. Woods, 1 Tex. 1.
[2] Calderwood v. Trent, 9 Rob. La. 227.
[3] Wilson v. Miller, 30 Md. 82.
[4] Capehart v. Etheridge, 63 N. C. 353.
[5] Livingston v. Kane, 3 Johns. Ch. 224.

to give such creditor an advantage over rival creditors whom he has in the meantime delayed by the writ.[1]

§ 200. Courts of equity will sometimes interfere for the protection of a mechanic's lien if it is apparent through the conduct of creditors who have obtained subsequent liens that there is danger of impairing the rights of the mechanic or material-man. Thus, where such a lien has been secured in accordance with statute for the erection of a building upon leased ground, an injunction will be allowed to prevent the removal of the building by a judgment creditor whose judgment is subsequent to the lien, the security being insufficient without such building.[2]

§ 201. An injunction restraining a sheriff from paying over money realized upon a levy is regarded as substantially the same in its effects as one restraining proceedings at law. In order therefore to warrant such an injunction, the same statutory bond or deposit should be required before issuing the writ as is required in the case of an injunction against proceedings at law.[3]

§ 202. Where a judgment has been obtained for the purchase price of the good-will of a trade or business, proceedings under the judgment will not be enjoined because of a violation of the vendor's undertaking not to carry on the same business, but the parties will be left to an action at law for damages.[4]

§ 203. It may sometimes happen that the peculiar circumstances of a particular case will warrant equity in a departure from the general rule denying relief in cases where the defense should have been urged at law. Thus, it has been held sufficient to warrant a perpetual injunction against a judgment in slander, that at the time when the defamatory words were uttered, as well as when the judgment was obtained, the person uttering such words was insane or in a state of partial mental

[1] Id.
[2] Barber v. Reynolds, 88 Cal. 497.
[3] Boker v. Curtis, 2 Edw. Ch. 111.
[4] Shackle v. Baker, 14 Ves. 468.

derangement on the subject to which the words had reference.[1] Such exceptions, however, resting upon the special circumstances of particular cases, in no way weaken the general rule.

§ 204. Where on the dismissal of an injunction bill filed to restrain proceedings under a judgment a decree has been rendered against complainant and his sureties in the injunction bond, a court of equity will not interfere with the proceedings, even though the original judgment, to enjoin the execution of which the bill was filed, has been set aside by the court in which it was rendered.[2] And a bill to enjoin defendant from asking judgment and taking out execution upon an injunction bond after the dissolution, is a proceeding entirely unknown to equity practice and can not be supported either on principle or authority.[3]

§ 205. With reference to the dissolution of injunctions against judgments at law the same general rule prevails as in other cases, and the injunction will, in general, be dissolved on filing an answer denying the equity of the bill.[4] And where an injunction has been improperly granted against proceedings under a judgment and a new trial has been allowed, the writ may be dissolved without waiting for a verdict in the second trial at law.[5] Where, however, it appears that since the judgment was enjoined facts have arisen that would make the issuing of a new injunction necessary in case of the dissolution of the first, it will not be dissolved, even though improvidently issued in the first instance.[6]

§ 206. In general upon a dissolution damages will be allowed only as to so much of the judgment as remains due and the collection of which was delayed by the injunction.[7] But where the whole of a judgment has been enjoined for a sum claimed to be due the judgment debtor from the creditor,

[1] Horner v. Marshall's Admr'x. 5 Munf. 466.
[2] Blythe v. Peters, 8 Yerg. 378.
[3] McReynolds v. Harshaw, 2 Ired. Eq. 195.
[4] Parkinson v. Trousdale, 8 Scam. 367.
[5] Vass v. Magee, 1 Hen & M. 2.
[6] Exnicios v. Weiss, 3 Mart. N. S. 480.
[7] Southerland v. Crawford, 2 J. J. Marsh. 370

bearing an insignificant proportion to the amount of the judgment, the injunction will be dissolved with heavy damages.[1]

§ 207. The effect of dissolving an injunction against proceedings under a judgment at law is to remove all barriers preventing the enforcement of the judgment. Execution may therefore issue immediately upon the dissolution and it is not necessary to obtain leave of the court for that purpose.[2] And it is held that it is erroneous for a court of equity, upon dissolving an injunction against a judgment at law, to enter a decree for the amount of the judgment.[3]

[1] Barrow v. Robichaux, 15 La. An. 70.
[2] Young v. Davis, 1 Monr. 152.
[3] Duncan v. Morrison, Breese, Ill. 118; Hubbard v. Hobson, Ib. 147.

CHAPTER IV.

OF INJUNCTIONS IN AID OF PROCEEDINGS IN BANKRUPTCY.

§ 208. Proceedings in state courts may be enjoined in aid of proceedings in bankruptcy.
209. The jurisdiction an equitable one.
210. Construction of twenty-first section of bankrupt act of 1867.
211. The same.
212. Cases will not be withdrawn from state courts into bankrupt court
213. Construction of fortieth section of bankrupt act of 1867.
214. Judgment liens obtained *bona fide* not impaired.
215. Homestead rights.
216. Effect of creditor's knowledge of debtor's insolvency.
217. Lien upon vessel.
218. Property acquired after adjudication.
219. Effect of discharge under state insolvent laws.
220. Parties to the proceeding; requisites of bill.
221. Receivers appointed by state courts.
222. Wrongful seizure by marshal.
223. Mortgages.
224. Where defendant declines answering.
225. Formal proceedings not necessary.
226. Effect of bankrupt's discharge.

§ 208. The jurisdiction of the United States courts sitting in bankruptcy to restrain proceedings in the state courts against the estate of a bankrupt, though sometimes questioned, may be regarded as too clearly settled to admit of doubt.[1] In such cases the United States courts exercise no supervisory jurisdiction over proceedings in the state courts, since the state court itself can not be enjoined, but the

[1] Irving *v.* Hughes, 2 Bank. Reg. 20; In re Wallace, Ib. 52; In re Metcalf, Bank. Reg. Sup. xliii.; In re Reed, Ib. i.; In re Metzler, Ib. ix.; In re Richardson, 2 Bank. Reg. 74; Samson *v.* Burton, 4 Bank. Reg. 1; Same *v.* Same, 5 Bank. Reg. 459; In re Bowie, 1 Bank. Reg. 185; Sedgwick *v.* Menck, Ib. 108.

litigant in that tribunal may be restrained from doing what would frustrate or impede the jurisdiction expressly conferred by the bankrupt act.[1] It is to be observed, however, that the jurisdiction is not dependent upon or derived from the fortieth section of the general bankrupt law of 1867, which provides that the court may restrain the debtor or any other person from making any transfer or disposition of the property pending the proceedings for an adjudication, and that while this section does impliedly recognize the jurisdiction, the previous enactments of other sections confer it. The provision of the fortieth section is held applicable only to

[1] Irving v. Hughes, 2 Bank. Reg. 20. But in Campbell's Case, 1 Abb. U. S. R. 185, the jurisdiction is questioned and its existence even denied, the court insisting that when the jurisdiction of the state court and the right of the plaintiff to prosecute his suit therein have once attached, that right can not be arrested or taken away by proceedings in another court. McCandless, J., observes: "The fact, therefore, that an injunction issues only to the parties before the court, and not to the court itself, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum. It follows, therefore, that this court (U. S. District Court) has no supervisory power over the court of common pleas of Armstrong county by injunction or otherwise, unless it is conferred by the bankrupt law. But we can not discover any provision in that act which limits the jurisdiction of the state courts, or confers any power on the bankrupt court to supersede their jurisdiction, or wrest property from the custody of their officers." * * * "Finding no such grant of power, either in direct terms or by necessary implication, from any of the provisions of the bankrupt law, we are not at liberty to interpolate it on any supposed grounds of policy or expediency. We shall, therefore, be compelled to dissolve this and all other injunctions in similar cases." The language of the court, however, is to be taken in connection with the fact that in the case under consideration an injunction was sought against the enforcement of judgments of unquestioned validity recovered in the state courts prior to the passage of the bankrupt act, and not only to restrain the judgment creditors from proceeding with the enforcement of their liens, but to enjoin the state court and its executive officers. So far as applicable to such a state of facts the observations of the court may be regarded as embodying the true doctrine, but in so far as they deny the general jurisdiction of the United States courts in bankruptcy to restrain proceedings in the state courts against the estate of the bankrupt subsequent to the filing of his petition, they are opposed to the clear weight of authority. See note 1, page 118.

the preliminary stage of the proceedings and in that stage it dispenses with conditions and formalities which must otherwise have been observed.[1]

§ 209. Proceedings in bankruptcy are regarded as in the nature of equity proceedings, and the jurisdiction of the court in the collection and distribution of the bankrupt's estate is in its nature an equity power.[2] And the court may enjoin proceedings against the property of the bankrupt under executions issued upon judgments recovered after the filing of the petition, it being the policy and aim of the bankrupt law to compel an equal distribution of the estate for the benefit of all the creditors.[3]

§ 210. The twenty-first section of the general bankrupt act of 1867, providing for a stay of proceedings in all actions at law or in equity against the bankrupt pending the question of his discharge, is applicable to all cases where the personal liability of the debtor is sought to be fixed by a final judgment pending the determination as to his discharge. The intent of the section being to prevent a race of diligence between creditors and to protect the bankrupt from being harassed with suits pending the question of his discharge, proceedings in the state courts will be enjoined until that question can be determined.[4]

[1] Irving *v.* Hughes, 2 Bank. Reg. 20.

[2] In re Wallace, 2 Bank. Reg. 52.

[3] Id. "It is the duty of this court," observes Deady, J., "by means of the jurisdiction given it, to preserve and distribute the estate of the bankrupt among his creditors, as the act prescribes. The respondents, by means of these executions, are attempting to prevent this distribution of the estate. An injunction is a proper remedy or means to prevent this wrong and fraud upon the law from being accomplished. A petition to the court is the proper means of invoking this power."

[4] In re Metcalf, Bank. Reg. Sup. xliii. Say the court, Benedict, J.: "The twenty-first section of the bankrupt act declares that 'no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined.' This is a very clear provision, the object of which is to prevent a race of diligence between creditors, and to protect the bankrupt from being harassed with suits pending the question of his discharge. It seems to

§ 211. It is to be borne in mind, however, that the jurisdiction conferred by the twenty-first section of the bankrupt act does not extend to the enjoining of proceedings against the bankrupt in any other district than that in which the proceedings in bankruptcy are pending, and the United States District Court has no power, either under the act of 1867 or independent of that statute, to restrain proceedings in the courts of the state by reason of bankrupt proceedings pending in another district and before another court.[1]

§ 212. While the jurisdiction of the United States courts sitting in bankruptcy to restrain proceedings against the estate of the bankrupt in the state courts is well established, these courts will not in the exercise of this their unquestioned prerogative withdraw cases from the state courts into their own forum and there determine them, such a course being clearly beyond their power.[2] They may, however, enjoin creditors who have obtained an agreement with the bankrupt which is in fraud of the law and an invasion of the rights of the general creditors, from making any use of such agreement.[3] Nor will these courts permit the creditor to proceed with a suit in the state courts, the effect of which would be to allow him to reap the advantage of his fraudulent agreement from the use of which he has already been enjoined, and an injunc-

apply to all cases where the personal liability of the debtor is sought to be fixed or ascertained by a final judgment pending the determination of the question of his discharge, and, in my opinion, it applies to a case like the present, where an action against the bankrupt is pending in the Court of Appeals of the state, to which an appeal has been taken by the bankrupt prior to the filing of the petition in bankruptcy. In such a case there is no final judgment within the meaning of the bankrupt act; the debtor's liability has not been finally determined; and there being no final judgment, the bankrupt act declares that the suit shall stop, pending the determination of the question of the bankrupt's discharge. This option to endeavor to obtain a discharge in bankruptcy, and failing in that, to defend all undetermined personal actions, is a right given a debtor by the bankrupt act under the Constitution of the United States, and he is entitled to be protected in that right by this court."

[1] In re Richardson, 2 Bank. Reg. 74.

[2] Samson v. Burton, 4 Bank. Reg. 1.

[3] Id.

tion will be granted to restrain him from proceeding with such suit, the question being peculiarly within the jurisdiction of a court of bankruptcy.[1]

§ 213. Where creditors have filed their petition for an adjudication of bankruptcy against their debtors, upon the ground of having made preferred assignments and of having confessed judgments with intent to give certain creditors preference over others, and an injunction has been allowed to restrain proceedings under the assignments and upon the judgments, such injunction will not be dissolved until the determination of the question of the debtor's bankruptcy. The intent of the fortieth section of the act being to prevent any interference with the debtor's property until a decision is reached upon the question of bankruptcy, the injunction will be continued until such decision can be had.[2]

§ 214. It is to be observed that the bankrupt law in no manner impairs the rights of judgment creditors whose liens upon the bankrupt's property have been acquired in good faith

[1] Id.

[2] In re Metzler, Bank. Reg. Sup. ix. The court, Blatchford, J., construing the fortieth section of the act of 1867, say: "The injunctions were granted under the fortieth section of the act. The intent of the provisions of that section manifestly is, to give the court authority in a case of involuntary bankruptcy, when an order is issued requesting the debtor to show cause why he should not be declared a bankrupt, to prevent by injunction any interference with the debtor's property until a decision shall be arrived at, whether the debtor is or is not to be adjudged a bankrupt. In the present case no such decision has been arrived at. The decision is suspended by the act of the debtors in denying that they have committed the act of bankruptcy alleged, and in demanding a trial by jury. The same facts which constituted sufficient ground for issuing the order to show cause, also furnish sufficient reasons for issuing the injunction. The court will not, on a motion of this kind, on affidavits, dispose of what are really all the issues involved in the proceeding. If the injunctions should be dissolved, and the debtors should afterward be adjudged bankrupts and an assignee of their estate be appointed, the court would have dissolved the injunctions on the same state of facts on which the debtors were adjudged bankrupts. Substantially the whole of the property of the debtors would have passed to the three preferred creditors, leaving to the assignee only an inheritance of litigation; and the very object of the remedy by injunction given by the fortieth section would have been defeated."

and without fraud before the passage of the act, or before the filing of the petition. The rights of judgment creditors who by the use of diligence have secured their debts as a lien upon the property of the debtor prior to the filing of his petition in bankruptcy, and without fraud or collusion, remain intact and the bankrupt court will not enjoin them from the enforcement of those rights.[1] Thus, where creditors acting in good faith have obtained judgments, issued executions and levied upon the personal property of their debtor prior to the filing of his petition, and where it does not appear that the property levied upon is more than the amount of the judgments, or that a sale by the assignee would realize more than a sale by the sheriff under execution, and it not appearing that any advantage would result to the creditors by retaining an injunction against such sale, the court will grant a dissolution.[2]

§ 215. A creditor who has obtained judgment and issued execution against his debtor before the filing of his petition in bankruptcy, will not be restrained from selling property claimed by the bankrupt as a homestead, since if such property is in fact a homestead the title thereto is unaffected by the operation of the bankrupt act, and the bankrupt, if wrongfully deprived of his homestead, has his remedy in the state courts.[3]

§ 216. The question of the creditor's knowledge of his debtor's circumstances at the time of obtaining judgment is not without weight in determining whether he shall be enjoined from pursuing his judgment in the state courts. And where the creditor at the time of obtaining judgment and execution and levying upon the property of his debtor, had sufficient cause to believe that he was insolvent and that he permitted him to obtain judgment, execution and levy with intent to give a preference within the meaning of the bankrupt act, the court will refuse to dissolve an injunction restraining such creditor from selling the property.[4] So where a creditor,

[1] Campbell's Case, 1 Abb. U. S. R. 185; In re Wilbur, 8 Bank. Reg. 71.
[2] In re Wilbur, 8 Bank. Reg. 71.
[3] In re Hunt, 5 Bank. Reg. 493.
[4] In re Bloss, 4 Bank. Reg. 37.

having reasonable cause to believe his debtor to be in an insolvent condition, attached his property and after obtaining judgment against him by default seized his real estate on execution, the debtor having filed his petition in bankruptcy before the completion of the levy, the assignee was allowed to enjoin the creditor from proceeding with a sale of the estate, the attachment having been levied within four months prior to the commencement of the proceedings in bankruptcy.[1]

§ 217. Where a vessel belonging to bankrupts has passed with their other assets into the hands of the assignee, and is afterward attached in proceedings *in rem* to recover damages incurred by a collision with another vessel prior to the adjudication of bankruptcy, the libellants will be restrained from holding the vessel or from interfering in any manner with the property in the hands of the assignee. The possession of the vessel by the assignee being the possession of the court, it can not lawfully be disturbed, and if libellants in the collision suit have a lien upon the vessel by reason of the collision, it must be submitted to the bankrupt court which has full power to liquidate such lien.[2]

§ 218. As regards property acquired by the bankrupt after the adjudication and pending proceedings for a final discharge, it is held to be within the protection of the general laws of the land, of which the bankrupt law is but a part. It is therefore competent for the state courts to restrain the coercive sale by a creditor of the property of the bankrupt acquired after the adjudication, the execution being upon a judgment for a debt which was provable in the court of bankruptcy.[3] And the

[1] Haskell *v.* Ingalls, 5 Bank. Reg. 205.

[2] In re People's Mail Steamship Co., 2 Bank. Reg. 170.

[3] Turner *v.* Gatewood, 8 B. Mon. 613. Though this decision was under the bankrupt act of 1841 it is believed to be equally applicable to the act of 1867. The doctrine as laid down in this case is that while the United States courts have exclusive jurisdiction of the proceedings in bankruptcy, the state courts may suspend such proceedings as are inconsistent therewith and which are attempted to be carried on through their instrumentality, until the question of the bankrupt's discharge can be determined. "There is in such course," say the court, Marshall, C. J., "no clashing of jurisdiction. The after-acquired property of the bank-

effect of such injunction is to render an officer selling the property with due notice of the injunction a trespasser *ab initio*, even though he may have levied upon the property before the granting of the writ.[1]

§ 219. While the authorities are not altogether reconcilable as to the effect of a discharge under the insolvent laws of a state upon judgments recovered against the insolvent, the better doctrine seems to be that a debtor who has obtained his discharge may enjoin proceedings against him to recover judgments upon his former liabilities.[2] Thus, where subsequent to his discharge under the state laws, proceedings by *scire facias* are instituted against the insolvent to revive a former judgment, and without fault or laches on his part he is prevented from pleading his discharge as a defense to the *scire facias*, equity will enjoin the enforcement of an execution under the judgment.[3]

§ 220. As regards the parties who may bring the action it

rupt is not within the operation of the proceeding in bankruptcy, and certainly not within the exclusive jurisdiction of the bankrupt court, but is left to the protection of the general laws of the land, of which the bankrupt law is but a part. And when the creditor is using the process furnished by that law to subject property which by the result of a pending litigation in another forum may be determined not to be liable, there seems to be a peculiar propriety in appealing to the ordinary tribunals for protection. We are satisfied, therefore, that the circuit judges of this commonwealth, and the justices of the peace appointed for the purpose within the several counties, have power to grant injunctions to prevent, after a decree in bankruptcy assigning the bankrupt's property, and in prospect of his discharge by final decree and certificate, the coercive sale of his property acquired after the assignment under an execution for a debt which was provable in the bankrupt court."

[1] Id.

[2] Starr *v.* Heckart, 32 Md. 267; Carrington *v.* Holabird, 17 Conn. 530. But see, *contra*, Katz *v.* Moore, 13 Md. 566, where it is held that a judgment at law will not be enjoined because of the discharge of the judgment debtor under state insolvent laws previous to the rendering of the judgment, even though the cause of action accrued before the discharge was granted. The court reach this conclusion upon the reasoning that, while the legal liability to pay the debt has ceased, the moral obligation remains as strong as before, and is sufficient to support the judgment."

[3] Starr *v.* Heckart, 32 Md. 267. And see Carrington *v.* Holabird, 17 Conn. 530.

is held that before the appointment of an assignee a petition for an injunction to stay proceedings in the state courts by creditors upon their judgment liens can be brought only by the bankrupt himself; after the appointment of the assignees they are the proper parties to apply for the relief.[1] And since the property of the bankrupt assigned under the act vests in the assignee for the benefit of all the creditors, he may properly enjoin all proceedings in the state courts relative to such property under an assignment in fraud of creditors.[2] The bill, however, must come within the ordinary principles of equity, and where it fails to show that there is danger of such loss as would be irreparable in a court of law the injunction will be refused.[3]

§ 221. Where, under proceedings in the state courts for the winding up of a partnership, receivers are appointed who take possession of the partnership property, and the partners are subsequently adjudged bankrupts, in the absence of any evidence impeaching the validity of the proceedings or the rightful custody of the property by the receivers, the bankrupt court will not grant an injunction to restrain the receivers from interfering with the property.[4]

§ 222. A United States marshal who, under a warrant in bankruptcy directing him to take possession of the bankrupt's property, seizes property held by a third person, being indemnified by the creditors for so doing, will not be allowed to restrain proceedings against him in the state courts for the alleged tort in the wrongful taking of such property. The bankrupt court will neither protect its officers in the commission of a tort, nor will it compel the party injured to submit his claim for damages to that court for adjudication.[5]

§ 223. The rights of mortgagees under the bankrupt law are subject to the control of the bankrupt court, and it may,

[1] In re Bowie, 1 Bank. Reg. 185.

[2] Sedgwick v. Menck, 1 Bank. Reg. 108.

[3] Beecher v. Bininger, 7 Blatch. 170.

[4] In re Clark, 3 Bank. Reg. 130. And see Alden v. Boston etc., 5 Bank. Reg. 230.

[5] In re Marks, 2 Bank. Reg. 175.

on the application of the assignee, restrain mortgagees from proceedings at law to foreclose a mortgage given by the bankrupt before the commencement of proceedings in bankruptcy, it being the duty of such secured creditor to bring the property into court to be distributed by the assignee.[1] And where a sale by mortgagees of chattels mortgaged to them by the bankrupt previous to filing his petition would injuriously affect the rights of the creditors by sacrificing the value of the property, there being a controversy concerning the right of the assignee to redeem, a temporary injunction may be allowed pending such controversy to prevent the mortgagees from selling under the power of sale.[2]

§ 224. If the defendant declines answering the injunction bill he is regarded for the purposes of a motion to dissolve as admitting its allegations, and the bill showing that the judgment enjoined has been discharged by proceedings in bankruptcy, it is error to dissolve the injunction.[3]

§ 225. In exercising the equity powers pertaining to a court of bankruptcy it is not necessary that resort should be had to the formal and plenary proceedings usual in courts of equity, but a mere petition setting forth the facts and praying for the relief sought is sufficient.[4] So a motion to dissolve the injunction is sufficient to raise the question of its merits without resort to the formality of a demurrer.[5] Nor need notice of the application for the injunction be given to the adverse party unless directed by the court or judge.[6]

§ 226. The effect of the final discharge of the bankrupt is

[1] In re Snedaker, 3 Bank. Reg. 155.

[2] Foster *v.* Ames, 2 Bank. Reg. 146.

[3] Peatross *v.* McLaughlin, 6 Grat. 64.

[4] In re Wallace, 2 Bank. Reg. 52.

[5] Id.

[6] Id. The restriction in the act of 1793, forbidding the issuing of injunctions without notice, is held applicable only to suits in equity in the Supreme and Circuit Courts of the United States, and it does not affect the allowance of injunctions under the equity power conferred upon the District Court by the bankrupt act in relation to matters exclusively within the jurisdiction of the bankrupt court. See also In re Muller, 3 Bank. Reg. 86.

to dissolve *ipso facto* an injunction granted until the discharge for the purpose of restraining creditors from proceeding against the bankrupt in the state courts. It follows, therefore, that no motion is necessary for a dissolution, the order for the discharge itself terminating the injunction, and the bankrupt must thereafter use his discharge itself as his protection in all cases affected thereby.[1]

[1] In re Thomas, 8 Bank. Reg. 7.

CHAPTER V.

OF INJUNCTIONS IN ECCLESIASTICAL MATTERS.

§ 227. Religious trusts protected in equity.
228. Violation of such trusts may be enjoined.
229. Distinction between a church in its corporate and in its ecclesiastical capacity.
230. Courts of equity will not revise acts of church discipline.
231. Will not correct proceedings of ecclesiastical tribunals.
232. Will not revise interpretation of church canons by ecclesiastical tribunal.
233. Decisions of church judicatory final as to all questions of faith, discipline, or ecclesiastical rule.
234. Usurpation of pastoral office, when enjoined.
235. When injunction will be refused against pastor.
236. Removal of minister by vote of church will not be enjoined.
237. Perversion of trust by trustees.
238. Trustees intruding upon functions of pastor.
239. Trustees acting within their authority will not be enjoined.
240. Trustees may enjoin pretended trustees.
241. Dedication of property to pious uses as effectual as its conveyance.
242. When court of equity will investigate doctrinal questions.
243. Conveyance of property to two religious bodies.
244. Injunction not allowed against a mere trespass.
245. Diversion of church property to school purposes may be enjoined.
246. Rights of pew holders.

§ 227. The aid of equity is frequently invoked for the protection of religious charities and for the enforcement of trusts created by donations of money or property for religious purposes. The jurisdiction in this class of cases rests upon the foundation of trusts and may be regarded as ancillary to the general jurisdiction of equity over that subject. In all such charities the courts will, if possible, give effect to the intention of the donor, provided such intention is legal, and the

objects of the trust being ascertained any perversion thereof or departure therefrom may be prevented by injunction.[1]

§ 228. In accordance with these principles it is held that where real estate is conveyed to the trustees of a religious association, to be forever afterward used as a place of religious worship according to the doctrines, forms and discipline of a particular church, if the minister and trustees allow ministers of a different faith, not recognized by the church prescribed as the standard, to use the premises, they are guilty of a departure from the trust created by the original contract, and a court of equity may properly interfere to prevent the

[1] Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. 439. In laying down the principles upon which courts of equity interfere in this class of cases, Sandford, assistant Vice Chancellor, says: "They proceed on the ground of *a trust*, and their aim is to ascertain its scope and objects and to enforce its proper and faithful administration. The jurisdiction is environed with greater difficulties than that over the ordinary private trusts which come under our review, by reason of the uncertainty which frequently prevails, as to the precise objects and intentions of the donor. The inquiry often arises after a great lapse of time, when no living witness can inform the conscience of the court, and when its search for truth must be made in history, and in the controversial writings of contemporaries of the donor. The course of the administration of the trust, and its alleged perversion, are also frequently shrouded in mystery and involved in the subtleties of polemics and theology. Still the court is bound to exercise its control over these charitable funds, as well as over the less difficult class of private trusts. * * In the leading English authority, The Attorney General *v.* Pearson (3 Merivale, 352, 395,) Lord Eldon decided that when it appears to have been the intention of the founder of a trust for religious worship, that a particular doctrine should be preached, it is not in the power of the trustees, or of the congregation, to alter the designed objects of the institution. The length and breadth of that decision may be the better estimated from the circumstance that the *purpose declared* in the deed, was simply 'the worship and service of God.' And those words, without more, are deemed in England to create a trust for the established religion. Yet on its being clearly shown by proof, that the purpose of the trust was to maintain dissenting doctrines, the court decreed that purpose to be carried into execution. And as there were no Unitarians known among the dissenters when the trust was created, (A. D. 1701,) the Unitarians were excluded from the trust. (7 Simons' R. 290 S. C. upon the first decree.)" See also Miller *v.* Gable, 2 Denio, 492; Baptist Church *v.* Witherell, 3 Paige, 296; Bowden *v.* McLeod, 1 Edw. Ch. 588; McGinnis *v.* Watson, 41 Pa. St. 9; Sutter *v.* Trustees, 42 Pa. St. 503; Winebrenner *v.* Colder 43 Pa. St. 244.

premises being used otherwise than in the manner prescribed by the terms of the trust.[1] So where property is conveyed to the trustees of a religious body to be used for church purposes, and it has been so used for a long and uninterrupted period, an unauthorized use and occupancy of the premises by persons not members of the religious society, thereby hindering and impeding the regular occupants of the church, will be enjoined, such trespass being continuous and irreparable.[2]

§ 229. A distinction has been drawn between the ecclesiastical and the corporate character of religious associations which is worthy of notice in determining whether a proper case is made out to warrant the interference of a court of equity. Thus, where the trust as declared in the deed conveying property to a religious society is for the interests and purposes of such society, either for church or burial purposes, and it does not specify the ecclesiastical connection of the society nor attempt to perpetuate any particular faith, the trustees take the property for the use of the society in its corporate rather than its ecclesiastical capacity. It follows therefore that a majority of the members of the corporate society may, under such circumstances, change its ecclesiastical relations or connections, as well as the views which shall be taught from the pulpit, without subjecting themselves to the restraining power of a court of equity.[3] And the fact that the society has separated from the church with which it was originally connected and has united itself with another denomination, does not constitute such a departure from the purposes of the original trust as to authorize the interference of equity, the property being still held in the same corporate capacity.[4]

§ 230. Courts of equity, having no ecclesiastical jurisdiction, will neither revise nor question the ordinary acts of

[1] Attorney General *v.* Welsh, 4 Hare. 572.

[2] Gilbert *v.* Arnold, 30 Md. 29.

[3] Burrel *v.* Associate Reformed Church, 44 Barb. 282.

[4] Id. And see Petty *v.* Tooker, 21 N. Y. 267; Robertson *v.* Bullions, 1 Kern. 243. It is to be observed, however, that the decisions in New York rest to a considerable extent upon the religious incorporation laws of that state.

church discipline or the administration of church government. Their only power arising from the conflicting claims of the parties to the church property and its use, they will not decide as to the status of membership and will not determine whether members have been properly or improperly excommunicated from a church, but accept the fact of their expulsion as conclusive proof that they are not members, and that having been expelled by a vote of the church, they are no longer entitled to any of the rights or privileges of membership. Thus, where property has been conveyed in trust for the use and benefit of a religious organization, members of the church who have been excommunicated by a vote of the majority, but who still insist on their right to enjoy and use the church property, and who have taken possession and made periodical uses of it without the consent and in defiance of the main body of the members, may be enjoined from interfering with or using the property.[1]

[1] Shannon *v.* Frost, 3 B. Mon. 253. Say the court, Robertson, C. J.: "As the conveyance from Crittenden was to the use of the Baptist Church, as an organized body of professing Christians in Frankfort, every member of that church has a beneficial interest in the property thus conveyed, so long as he or she shall continue to be a member, but no longer. It is only as a constituent element of the aggregated body or church that any person can acquire or hold, as a *cestui que trust*, any interest in the property thus dedicated to that church. Curd *et al. v.* Wallace *et al.*, 7 Dana, 195. Such is the effect of this conveyance to congregational uses, and such the civil law of our state; and upon this foundation alone must our decision rest. The judicial eye of the civil authority of this land of religious liberty can not penetrate the veil of the church, nor can the arm of this court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excinded members. When they became members they did so on the condition of continuing or not, as themselves and their church might determine. In that respect they voluntarily subjected themselves to the ecclesiastical power, and can not invoke the supervision or control of that jurisdiction by this or any other civil tribunal. Then, not being now members of the church to whose use the ground was conveyed, the appellants seem no longer to be entitled to any beneficial interest in that property, nor to any other right which this court can either enforce or recognize; and consequently the old church, as organized at the date of that conveyance, and still subsisting, must be deemed to be entitled to the exclusive use and enjoyment of the property for all the purposes for which it was first dedicated. And, as

§ 231. The only ground upon which civil courts interfere in ecclesiastical cases being the protection of civil rights, they will not interfere with the exercise of any discretion on the part of church authorities and will not revise or correct the proceedings of ecclesiastical tribunals.[1] And an injunction will not be granted to restrain a bishop of a church from prosecuting the sentence of an ecclesiastical tribunal deposing a minister from his calling, a court of equity refusing under such circumstances to review the action of the church tribunal any further than to ascertain whether, according to the law of the church, such tribunal had jurisdiction in the premises.[2] And where complainant has by his own conduct waived all right to object to the authority of the bishop, or to the manner in which the ecclesiastical court was constituted, he can not afterwards make such objections the foundation

that right is of the character of a trust, is it not the duty of a court of equity to uphold it and secure its full and undisturbed enjoyment? Such was the purpose of the modified reinstatement of the injunction."

[1] Walker *v.* Wainwright, 16 Barb. 486; Chase *v.* Cheney, Supreme Court of Illinois, 10 Am. Law Reg. N. S. 295.

[2] Walker *v.* Wainwright, 16 Barb. 486. The following observations of the court, Edmonds, J., are worthy of consideration: "The view taken by me of one feature of this case will render unnecessary the examination of many of the questions which were discussed on the argument; and I shall, therefore, be silent in regard to them. The only ground on which this court can exercise any jurisdiction in this case is, that the threatened action of the defendant may affect the civil rights of the plaintiff, for the protection of which he has a proper recourse to the civil courts. The rights which are here invoked, for that purpose, are his exemption from taxation, and the performance of certain civil duties. Conceding (though without expressly ruling the point) that here is ground enough for the action of this court, it becomes material to say that the only cognizance which the court will take of the case, is to inquire whether there is a want of jurisdiction in the defendant to do the act which is sought to be restrained. I can not consent to review the exercise of any discretion on his part, or at all inquire whether his judgment or that of the subordinate ecclesiastical tribunal can be justified by the truth of the case. I can not draw to myself the duty of revising their action, or of canvassing its manner or foundation, any further than to inquire whether, according to the law of the association to which both of the parties belong, they had authority to act at all. In other words, I can inquire only whether the defendant has the power to act, and not whether he is acting rightly."

for enjoining the enforcement of their sentence and is debarred from relief in equity.[1]

§ 232. The jurisdiction of ecclesiastical tribunals being conclusive as to ecclesiastical offenses, as well as upon doubtful and technical questions involving a criticism of the canons of a church, the civil courts will not revise the decisions of such tribunals for the purpose of ascertaining or defining their jurisdiction, nor will they revise or question their construction and interpretation of the canons of the church. And where a rector is placed upon trial before an ecclesiastical tribunal of his church for non-conformity to its doctrines, he will not be allowed to enjoin its proceedings upon the ground of a misconstruction of the canons of the church and a want of authority in the spiritual court, the same objections having been made to that court and its jurisdiction having been sustained.[2]

[1] Id.

[2] Chase v. Cheney, Supreme Court of Illinois, 10 Am. Law Reg. N. S. 295. Thornton, J., delivering the opinion of a majority of the court, says: * * * "The minister, in a legal point of view, is a voluntary member of the association to which he belongs. The position is not forced upon him; he seeks it. He accepts it with all its burdens and consequences; with all the rules, and laws, and canons then subsisting, or to be made by competent authority; and can, at pleasure and with impunity, abandon it. If they were merciful and regardful of conscientious scruples, he knew it; if they were arbitrary, illiberal, and attempted to chain the thoughts and consciences, he knew it. They can not, in any event, endanger his life or liberty; impair any of his personal rights; deprive him of property acquired under the laws; or interfere with the free exercise and enjoyment of religious profession and worship, for these are protected by the constitution and laws. While a member of the association, however, and having a full share in all the benefits resulting therefrom, he should adhere to its discipline; conform to its doctrines and mode of worship; and obey its laws and canons. If reason and conscience will not permit, the connection should be severed. 'The only remedy which the member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it.' Forbes v. Eden, Law Rep. 1 S. & D. App. 568. * * * This case may then be briefly summed up: A rector in the church is charged with non-conformity to its doctrines—intentional omissions in the ministration of its ordinances; and the attempt is made to organize a court, composed of his brother clergymen,

§ 233. And the principle may now be regarded as too well established to admit of controversy, that in the case of a reli-

for his trial. He appeals to the civil court, and alleges, as the chief reason for interposition, the want of authority in the spiritual court to try him, and a misconstruction of the canons. The same point was made to that court and its power denied. It was urged with the same earnestness, and enforced with the same arguments there as here. That court overruled the objections and decided that it had jurisdiction. Five intelligent clergymen, presumed to be deeply versed in biblical and canonical lore, were more competent than this court to decide the peculiar questions raised; why should we review that and not every other decision which involves the interpretation of the canons? It is conceded that when jurisdiction attaches, the judgment of the church court is conclusive as to purely ecclesiastical offenses. It should be equally conclusive upon doubtful and technical questions, involving a criticism of the canons, even though they might comprise jurisdictional facts. It requires no more intellect, information or honesty, to decide what is an ecclesiastical offense than to determine the authority of the court according to the canons. * * * Having given this case a most careful consideration, our deliberate judgment is that the ecclesiastical court ought not to be restrained by the mandate of this court." Lawrence, C. J., and Sheldon, J.: "We concur in the decision of the case at bar announced in the foregoing opinion, and we also concur in the opinion itself, except as to one principle therein. We understand the opinion as implying that, in the administration of ecclesiastical discipline, and where there is no other right of property involved than the loss of the clerical office or salary as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, under the laws or canons of the religious association to which it belongs, and its decision of that question is binding upon secular courts. This is a principle of so grave a character that, believing it to be erroneous, we are constrained to express our dissent upon the record. We concede that when a spiritual court has once been organized in conformity with the rules of the denomination of which it forms a part, and when it has jurisdiction of the parties and the subject matter, its subsequent action in the administration of spiritual discipline will not be revised by the secular courts. The simple reason is that the association is purely voluntary, and when a person joins it, he consents that for all spiritual offenses, he will be tried by a tribunal organized in conformity with the laws of the society. But he has not consented that he will be tried by one not so organized; and when a clergyman is in danger of being degraded from his office, and losing his salary and means of livelihood, by the action of a spiritual court unlawfully constituted, we are very clearly of opinion he may come to the secular courts for protection. It would be the duty of such courts to examine the question of jurisdiction, without regard to the decision of the spiritual court itself; and if they find such tribunal has been

gious congregation or an ecclesiastical body which is itself but a subordinate member of some general church organization having a supreme ecclesiastical judicatory over the entire membership of the organization, the civil tribunals must accept the decisions of such church judicatory as final and conclusive upon all questions of faith, discipline, or ecclesiastical rule, and the party aggrieved can not invoke the aid of the civil courts to have such proceedings reversed.[1]

organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. We consider this position clearly sustainable upon principles and authority."

[1] Watson v. Jones, U. S. Supreme Court, December Term, 1871, will appear in 13 Wal. The governing principle in this class of cases is clearly enunciated in the very able opinion of Mr. Justice Miller as follows: * * * "It is the case of property acquired in any of the usual modes for the general use of a religious congregation, which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government. The case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to the use of the property so acquired. Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the general assembly over all. These are all called, in the language of the church organs, judicatories, and they entertain appeals from the decisions of those below and prescribe corrective measures in other cases. In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have

§ 234. Equity will not ordinarily enjoin a minister who has been deposed by his congregation from continuing to preach in the church, since he thereby becomes a mere trespasser, without right, and the courts of law afford ample remedy for the grievance.[1] But where a minister, not chosen in accordance with the usages of the church and without authority legal or equitable to officiate as its minister, forcibly usurps the pastoral office and attempts to exercise its functions by officiating as pastor, contrary to the wishes of a majority of the church, and declares his intention of continuing so to do for a long period in the future unless prevented by physical force, an injunction will be allowed, since the trespass is continuing in its duration and irreparable in its nature, there being no rule of law or measure of damages by which the injury resulting from a deprivation of the free enjoyment of religious worship can be estimated.[2]

§ 235. An injunction will not be granted for the purpose of ejecting a clergyman from his possession of a church and to prevent his preaching therein where he is actually in office, having been placed there in the first instance by the act of the

been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. * * * The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." And see Harmon v. Dreher, 1 Speers Eq. 87; State of Missouri ex rel. v. Farris, 45 Mo. 183.

[1] German Church v. Maschop, 2 Stockt. 57.

[2] Trustees v. Stewart, 43 Ill. 81.

church and holding possession under claim of right, there being no other claimant of the pastoral office.[1]

§ 236. The civil courts recognize to the fullest extent the right of religious bodies to control their own internal affairs and to select their own ministers, in the absence of any obligations imposed upon them by the conveyances under which they hold their property. And where the deed conveying the property and buildings of a church is silent as to the mode of electing a minister and his continuance in office, and makes no provision for his salary or support, for which he is wholly dependent upon the voluntary contributions of the church members, a court of equity will not interfere to enjoin his removal by a vote of the church.[2]

§ 237. Any act upon the part of trustees of a religious society which obstructs the enjoyment of the property for the purposes and in the manner authorized by the usages of the church, is a departure from their trust which will be corrected in equity, such trustees holding the church property for the use of the beneficiaries and the utmost good faith being exacted in the performance of their trust.[3] Nor does the fact that a court of law may have concurrent jurisdiction in such a case by *mandamus*, or that a statutory remedy is provided, deprive the court of equity of its jurisdiction.[4] Thus, where the trustees have closed the church against the minister and those who desire to hear him, contrary to the wishes of a majority of the members, an injunction is the proper remedy, the grievance being a continuing act intended to prevent complainants from exercising their right of worship in the church.[5] So trustees have been restrained by injunction from appointing a minister not duly qualified according to the doctrines and standard of the church.[6]

[1] Youngs *v.* Ransom, 31 Barb. 49.
[2] Porter *v.* Clarke, 2 Sim. 520.
[3] Brunnenmeyer *v.* Buhre, 32 Ill. 183.
[4] Id.
[5] Id.
[6] Milligan *v.* Mitchell, 1 Myl. & K. 446. But the court refused that part of the motion which sought to restrain the trustees from allowing persons

§ 238. But the fact that trustees of a religious association, contrary to the express terms of their charter, have intruded upon the functions of the minister or other officers of the church, does not constitute sufficient ground for the interposition of equity by injunction, the proper remedy being by *mandamus*.[1]

§ 239. While the jurisdiction of equity to prevent any departure from the objects of a trust created for religious purposes is, as we have already seen, firmly established, the civil tribunals will not wrest from the properly constituted authorities of a church the right to exercise their discretion over matters properly within their own control. And a court of equity will not interfere upon the complaint of members of a church to restrain the trustees thereof from a sale of the church premises, the trustees being vested with full control over the affairs of the church and the sale being a matter entirely within their own discretion.[2]

§ 240. The trustees of a church are proper parties complainant to a bill for an injunction against pretended trustees to prevent their meddling with the affairs of the church, and such an action need not be brought in the name of the state.[3]

§ 241. It is not necessary that property should actually have been conveyed to the uses of a religious society to create a trust entitled to the protection of equity, and where real estate has been dedicated to religious uses and has been held and occupied by a church for religious purposes and as a burial ground for a period of fifty years, with the acquiescence of the original donor, his heirs will be enjoined from disturbing such possession and from attempting to regain the property.[4] And although the congregation is merely a voluntary society, never incorporated, and acting by committees or trustees chosen from time to time by a vote of the members, such trustees, being in

not properly qualified to officiate occasionally during the short period yet to elapse before the hearing.

[1] Tartar *v.* Gibbs, 24 Md. 323.

[2] Van Houten *v.* First Church, 2 C. E. Green, 126.

[3] Trustees *v.* Hoessli, 13 Wis. 348.

[4] Beatty *v.* Kurtz, 2 Pet. 566.

actual possession of the premises and acting by direction of the society to prevent any disturbance of that possession, are proper parties to maintain a bill for injunction.[1]

§ 242. The question of the extent to which a court of equity will investigate the doctrines and inquire into the modes of worship of a religious society is largely dependent upon the terms and conditions of the trust under which its property is held. And where property is conveyed to trustees for the use of a religious association upon the condition of its being forever used as a place of worship in accordance with the forms and doctrines of a particular church, such doctrinal points are proper subjects of investigation by the court in determining whether such a perversion of the trust exists as to warrant an injunction.[2] But where such investigation is not necessary for the protection and enforcement of the trust

[1] Id. In the ornate language of Mr. Justice Story the court say: * * "The next question is, as to the competency of the plaintiffs to maintain the present suit. If they are proved to be the regularly-appointed committee of a voluntary society of Lutherans, in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession, under circumstances like those stated in the bill, we do not perceive any serious objection to their right to maintain the suit. It is a case, where no action at law, even if one could be brought by the voluntary society, (which it would be difficult to maintain,) would afford an adequate and complete remedy. This is not the case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown Congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement, is to be taken from them, the sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It can not be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living."

[2] Kniskern v. Lutheran Churches, 1 Sandf. Ch. 439; Miller v. Gable, 2 Denio, 492; Baptist Church v. Witherell, 3 Paige, 296; McGinnis v. Watson, 41 Pa. St. 9; Sutter v. Trustees, 42 Pa. St. 503; Winebrenner v. Colder, 43 Pa. St. 244.

the court will not institute any inquiries into doctrinal or polemical questions.[1]

§ 243. Where property is conveyed in trust for the use of two unincorporated religious bodies, and one of the two, in violation of the terms of the trust, takes exclusive possession, a proper case is presented for an injunction. Such a dispute is not merely as between tenants in common of realty, but it concerns the rights and privileges of members of unincorporated societies, and the remedy at law being inadequate equity may properly interfere.[2]

§ 244. If the injury complained of is merely a trespass susceptible of adequate relief in an action at law an injunction should not be allowed. Thus, where two conflicting sects of a church were contending as to the right of possession of church property and the party in actual possession had obtained an injunction restraining defendants from forcibly entering into the premises to bury their dead, the injunction was dissolved on the ground that the acts in question merely constituted a trespass and were not productive of irreparable injury.[3]

§ 245. Where land is conveyed to a church to be used exclusively for religious purposes and for none other, an injunction will be granted to restrain a diversion of the property for school purposes, and the action may be brought by the pew owners of the church, they having sufficient interest in the property to make them proper parties complainant to the bill.[4] And the trustees of a church may be enjoined from leasing its property for school purposes contrary to the terms of the grant.[5]

§ 246. Pew holders in a church will not be allowed to enjoin the trustees from rebuilding where there is no impropriety in the disposition of the funds, and it is conceded that the old buildings are in a dilapidated condition and that a new

[1] German etc. Church *v.* Maschop, 2 Stockt. 57.
[2] Kisor's Appeal, 62 Pa. St. 428.
[3] Miller *v.* English, 2 Halst. Ch. 304.
[4] Howe *v.* School District, 43 Vt. 282.
[5] Perry *v.* McEwen, 22 Ind. 440.

edifice on the same location would be highly beneficial. Complainants in such a case will be left to the assertion of their legal and equitable rights in the new building when completed.[1] Even where the trustees are about pulling down the church for the purpose of using the materials in the erection of a new structure in a different location, the nature and extent of the injury are not such as to call for an injunction to protect the pew holders and they will be left to their remedy at law.[2]

[1] Heeney v. Trustees etc., 2 Edw. Ch. 608.
[2] Van Horn v. Talmage, 4 Halst. Ch. 108.

CHAPTER VI.

OF INJUNCTIONS AFFECTING REAL PROPERTY.

I. General Features of the Relief.
II. Injunctions in aid of Possession.
III. Of Judicial Sales where Judgment Debtor has no Title.
IV. Cloud upon Title.
V. Of Injunctions to restrain the Collection of Purchase Money on Failure of Title.
VI. Mortgages and Deeds of Trust.
VII. Ejectment.
VIII. Special Cases.

I. General Features of the Relief.

§ 247. Courts of equity averse to interference where relief may be had at law.
248. Will not interfere in the absence of fraud, accident, or mistake.
249. Defense at law a bar to injunction.
250. Only judgment creditors can restrain disposition of debtor's property.
251. Unavoidable accident may warrant the relief.
252. Estoppel *in pais*.
253. The general rule sometimes relaxed.
254. Enforcement of trusts.
255. Trusts.
256. Tenant for life and remainder-man.

§ 247. The numerous and complicated questions growing out of transfers of real property, as well as those which are connected with its possession and enjoyment, have given rise to frequent applications for the exercise of the extraordinary aid of equity by injunction. While, as we shall see, the decisions of the courts are not altogther harmonious in cases

of this nature, they have generally been averse to any interference where the questions involved were of such a kind as to be determinable in a legal forum. And it is only upon a clear showing of the inadequacy of the remedy at law that equity will assert its jurisdiction.

§ 248. It may be laid down as a general rule that equity will not interfere with proceedings at law affecting the title to real estate in the absence of fraud, accident, or mistake.[1] Thus, purchasers for valuable consideration and without notice of conflicting equities will not, on account of such equities, be enjoined from taking possession of premises under a judgment in ejectment in their favor, no fraud being alleged against them.[2] Nor will the loss of a deed necessary to complete a chain of title warrant the interposition of equity in the absence of fraud, accident, or mistake.[3] So too a sale of real estate under legal process will not be enjoined because of irregularities in the proceedings, or because the judgment on which process issued was void, where no serious injury or embarrassment to title is shown as likely to result from allowing the sale to proceed.[4]

§ 249. The fact that the ground relied upon as the foundation for an injunction can be urged as a defense at law is a sufficient reason for withholding the relief. And where a bill is filed to establish a legal title and for a perpetual injunction against proceedings at law connected therewith, in the absence of any allegation of inability to defend at law the relief will be refused.[5] So legal proceedings affecting the title to real estate will not be restrained on the ground that plaintiff has no cause of action. Thus, the plaintiff in an action of forcible entry and detainer will not be enjoined from further prosecuting his action because he has no title, the title to the premises being in defendant, since such defense can as well be

[1] Rogers *v.* Cross, 3 Chand. 34; Cameron *v.* White, 3 Tex. 152; Evans *v.* Lovengood, 1 Jones Eq. 298.

[2] Evans *v.* Lovengood, 1 Jones Eq. 298.

[3] Rogers *v.* Cross, 3 Chand. 34.

[4] Morgan *v.* Whiteside's Curator, 14 La. 277; Cameron *v.* White, 3 Tex. 152.

[5] DeGroot *v.* Receivers etc., 2 Green Ch. 198.

relied upon in the action itself.[1] Nor will equity interfere with the prosecution of actions of forcible entry and detainer where it does not appear that a certain and manifest irreparable injury will result unless the relief be allowed, and where there are no allegations of fraud, accident, mistake, or surprise.[2]

§ 250. It is a well-established rule that equity will not entertain jurisdiction to restrain a debtor from disposing of his property at the suit of a creditor whose claim or demand is not yet reduced to judgment and constitutes no lien upon the property. Until his rights are fixed and established by judgment a creditor is entitled to no control over his debtor's property and he will not be allowed to question its disposition or management. Any other rule than this would lead to unnecessary and often fruitless interruption of property rights by creditors at large whose demands might be utterly unfounded in law and incapable of being established by judgment.[3] In the application of this rule a judgment, to warrant the interference of a court of equity, must be such an one as constitutes a lien upon the real estate sought to be controlled. A foreign judgment will not therefore suffice, since, until reduced to judgment in the state where the injunction is sought, it constitutes no lien on the premises. Until such judgment is recognized and established by the courts of the state where relief is sought, the judgment creditors have no other or different rights as to the property of their debtor than if their demand was not yet established at law.[4]

[1] Chadoin *v.* Magee, 20 Tex. 476.

[2] Crawford *v.* Paine, 19 Iowa, 172; Lamb *v.* Drew, 20 Iowa, 15.

[3] Wiggins *v.* Armstrong, 2 Johns. Ch. 144. And see Candler *v.* Pettit, 1 Paige, 168.

[4] Buchanan *v.* Marsh, 17 Iowa, 494. In this case suit was begun upon a judgment rendered in Canada, and an injunction was asked at the same time to restrain defendants from alienating or encumbering their real estate until the rights of the parties should be determined at law. Wright, C. J delivered the opinion of the court, saying: "Plaintiffs are not judgment creditors. For the purposes of the present inquiry, their action is like any ordinary one upon a note, account, or any simple contract, or evidence of indebtedness. They have a foreign judgment; but until it becomes a judgment in our courts, they are no more than creditors at large, and until they obtain the recognition of their claim by the adjudication of our state

§ 251. Relief may sometimes be had against a sale of real property on the ground of unavoidable accident where great injury would result to complainant if the sale were allowed to proceed unchecked. Thus, where a conveyance of land is executed and delivered and the purchase price paid, but the conveyance is lost before being recorded, a sale of the premises by the heirs or representatives of the grantors may be enjoined, such sale being a fraud upon the rights of the grantees.[1] But a stranger to the title, even though he be in possession, will not be permitted to enjoin the real owners from asserting their title on the ground that it was fraudulently obtained.[2]

§ 252. It may sometimes happen that the owner of lands is by his own acts estopped from exercising any subsequent control over them and may be enjoined from interference. Thus, a dedication of land to the use of the public, being in the nature of an estoppel *in pais*, equity will enjoin any attempt to revoke such dedication and to sell the land.[3] And where real estate has been for many years occupied by a church for pious uses with the knowledge and consent of the donor, his heirs will be perpetually enjoined from disturbing such

tribunals, they have no other or different rights as to the property of their debtor than if their demand was endorsed by a less solemn or conclusive proceeding or instrument. For, however effectual such judgment may be, or whatever the faith and credit to which it may be entitled, it is very certain that it can not be enforced here until its validity is recognized and passed upon by the judgment of our courts. * * * This being so, upon common law principles, we know of no principle upon which plaintiffs were entitled to this injunction. The rule is, as far as we know, without exception that the creditor must have completed his title at law, by judgment (if not by execution), before he can question the disposition of the debtor's property. Angell *v.* Draper, 1 Vern. 399; Shirley *v.* Watts, 3 Atk. 200; Bennet *v.* Musgrove, 2 Ves. 51; Wiggins *v.* Armstrong, 2 Johns. Ch. 144; Jeremy's Eq. 161. The reason of the rule is, that, until the creditor has established his title, or his debt, by the judgment of a court, he has no right to interfere; for, unless he has a certain claim upon the property of the debtor, he has no concern with his frauds. To establish any other rule, might lead to an unnecessary and perhaps fruitless and oppressive interruption of the exercise of the debtor's rights. 2 Johns. Ch., *supra*."

[1] Wright's Heirs *v.* Christy's Heirs, 39 Mo. 125.

[2] Treadwell *v.* Payne, 15 Cal. 496.

[3] Mayor *v.* Franklin, 12 Geo. 239.

possession, even though the dedication may have been in such vague terms as not to be supported generally in equity.[1]

§ 253. While as a general rule courts of equity look unfavorably upon applications for injunctions pending proceedings at law to determine the title to realty, there may be peculiar circumstances connected with the property rendering it imperative that the rule should be somewhat relaxed and the relief granted. Thus, where the title to mining property is in controversy an injunction may be granted to preserve the property pending litigation to try the right, the exception resting upon the peculiar nature of the property in dispute.[2] So in an action to set aside a fraudulent conveyance of land and to recover possession of the premises on which a valuable crop is standing, an injunction has been allowed to prevent defendant from disposing of the land until the rights of the parties should be determined at law.[3]

§ 254. Though the protection and enforcement of trusts is a favorite branch of the jurisdiction of courts of chancery, it is not every case of a trust that will warrant relief by injunction. Thus, equity will not interfere to prevent the execution of a general power in a trustee to sell lands for the benefit of others where it does not appear that the power is being inequitably or unjustly exercised.[4] But where land is conveyed to a corporation in trust to be used for the purposes of a public street, the owner of property on such street possesses the character of a *cestui que trust* with reference to such land and may enforce the execution of the trust by restraining its violation.[5]

§ 255. The *cestui que trust* of lands in a case where the trust is created for his own benefit, can not by investing his individual means in building upon the lands create a trust in his own favor to the prejudice of his judgment creditors. And the creditors may invoke the aid of equity to prevent such

[1] Kurtz v. Beatty, 2 Cranch C. C. 699.
[2] Hess v. Winder, 34 Cal. 270.
[3] Corcoran v. Doll, 35 Cal. 476.
[4] Selden v. Vermilyea, 1 Barb. 58.
[5] Lawrence v. Mayor etc., 2 Barb. 577.

a diversion of the debtor's means, and on their application the payment of rents by the trustees to the debtor will be enjoined and a receiver appointed to apply the rents in payment of the judgment.[1]

§ 256. As between the tenant for life and the remainder-man it is held that mere apprehensions that the tenant is about to remove property from the estate are not sufficient foundation for an injunction against such removal, but such facts and circumstances must be set forth as will show that the apprehensions are well founded, and this being done equity may interfere.[2] And an isolated conversation between the tenant for life and the remainder-man in which, under the influence of ardent spirits and excited by a quarrel, the former has threatened a removal of the property, will not warrant a court in granting an injunction.[3] Such facts and circumstances must be shown as are sufficient to constitute a reasonable ground for apprehending that the tenant for life intends the commission of a fraud and thereby to defeat the ulterior estate by the destruction or removal of the property.[4]

II. Injunctions in aid of Possession.

§ 257. Courts of equity averse to interference with possession.
258. Exception to the rule.
259. Accident a ground for the relief.
260. Mandatory injunction to deliver possession.
261. Complainant's right must be superior.
262. Equity will not interfere where there is a remedy at law.
263. Complainant must make clear showing.
264. Equity will not review errors at law.
265. Quiet and uninterrupted possession a ground for relief.

§ 257. As a general rule courts of equity will not interfere by preliminary injunction to change the possession of real

[1] Johnson v. Woodruff, 4 Halst. Ch. 120, affirmed by Court of Appeals, Ib. 729.

[2] Swindall v. Bradley, 3 Jones Eq. 353.

[3] Airs v. Billops, 4 Jones Eq. 17.

[4] Mercer v. Byrd, 4 Jones Eq. 358.

property, the title being in dispute, and to transfer it to one whose rights are not yet established at law.[1] Nor should an injunction be allowed for the mere purpose of restraining naked trespasses to realty, or for quieting the possession of one who shows no title.[2] And where one has been erroneously put in possession of land under a writ of restitution, his title not having been established at law, equity will refuse to enjoin proceedings instituted for the purpose of recovering possession of the premises, the denial of relief being based upon the fact that complainant's title is not yet established.[3]

§ 258. Notwithstanding the general rule as stated in the preceding section by which courts of equity refuse to interfere with possession before the right is determined at law, if defendant's possession is but an interruption of the prior possession of complainant whose right is clear and certain, an injunction may be allowed without compelling complainant to establish his title by an action at law.[4] The interference in such case rests, as in cases of nuisance, upon a clear and certain right to the enjoyment of the subject in question and an injurious interruption of that right which upon just and equitable grounds ought to be prevented.[5]

§ 259. Where from the peculiar circumstances of the case it is impossible for defendant to establish his defense at law in an action to recover possession, the strictness of the rule may also be departed from. Thus the loss of one conveyance in a chain of title which is necessary to establish the defense to the action will warrant equity in restraining proceedings, as well upon the ground of accident as to prevent a cloud upon title. Under such circumstances defendant being prevented by accident from perfectly and adequately asserting his title at law, is entitled to the aid which only equity can give.[6] So where complainant, without fault upon his part, has had no

[1] Erie etc. *v.* Delaware etc., 6 C. E. Green, 283.
[2] Conway, *ex parte*, 4 Ark. 302; McGee *v.* Smith, 1 C. E. Green, 462.
[3] Thompson *v.* Engle, 3 Green Ch. 271.
[4] Conway, *ex parte*, 4 Ark. 302.
[5] Id.
[6] Butch *v.* Lash, 4 Iowa, 215.

opportunity of being heard at law he may receive the aid of equity to protect him in his possession as owner of the premises. Thus, a perpetual injunction will be allowed against the execution of a writ of *habere facias possessionem* against the premises of one who was not a party to the litigation.[1]

§ 260. Where proceedings have been instituted in a court of equity to establish the title to real estate and a decree has been rendered that defendant make a conveyance vesting the legal title in complainant, neglect to execute such decree will warrant a mandatory injunction to deliver possession. In such case equity proceeds upon the principle that its decree, not having been complied with, operates as a conveyance, and the right being sufficiently established an injunction is a proper remedy for its enforcement; otherwise complainant might be compelled to resort to proceedings in ejectment to obtain the possession to which he is already entitled by the decree, and thus be greatly delayed and embarrassed.[2]

§ 261. In general equity will not interpose to prevent the enforcement of a legal right except upon clear and satisfactory showing of a right superior to that which it is sought to

[1] Goodnough *v.* Sheppard, 28 Ill. 81.

[2] Garretson *v.* Cole, 1 Har. & J. 373. It is proper to remark that the decision of the chancellor in this case rests partially upon an act of legislature. Hanson, Chancellor, observes: "An injunction for possession is not a new thing in a court of equity. It has long been used in England; it is directed in certain cases by the aforesaid act of assembly; and it would disgrace our laws and administration of justice if, after a title to land has been established by the adjudication of a court, there could be no way of obtaining possession but after obtaining judgment in ejectment." So it is said by an eminent jurist that "Courts of equity also interfere, and effectuate their own decrees in many cases by injunctions, in the nature of a judicial writ or execution for possession of the property in controversy; as for example, by injunctions to yield up, deliver, quiet, or continue the possession, followed up by a writ of assistance. Injunctions of this sort are older than the time of Lord Bacon, since, in his Ordinances, they are treated as a well-known process. Indeed, they have been distinctly traced back to the reign of Elizabeth, and Edward the Sixth, and even of Henry the Eighth. In some respects they bear an analogy to sequestrations; but the latter process, at least since the reign of James the First, has been applied, not merely to the lands in controversy in the cause, but also to other lands of the party." 2 Story's Eq. § 959.

restrain. In accordance with this principle a party in possession of real estate, but without legal title, has no sufficient equities as against the legal owner to enjoin a writ of restitution which has been granted him for the purpose of obtaining possession of his premises.[1] And to warrant a court of equity in enjoining proceedings to recover possession of realty it must clearly appear that he who seeks the relief is remediless by the usual course of proceedings at law. This not appearing, and it not being shown that the parties against whom the injunction is sought are insolvent, the writ will not be allowed.[2]

§ 262. The general principle underlying the entire jurisdiction of equity by injunction, that the relief will not be granted where adequate remedy can be had at law, applies with equal force to cases where relief is sought in aid of the possession of real property. Wherever, therefore, sufficient redress can be had in the courts of law, parties will be left to pursue their remedy in a legal rather than an equitable tribunal.[3] Thus, where parties are in possession claiming as devisees under a will which has been admitted to probate, equity will not, pending an appeal from the decision of the probate court, aid an adverse claimant by injunction to remove them, since full and adequate redress may be had at law.[4] So where the object of an injunction bill is merely to obtain possession of land upon which defendant has entered and committed trespasses and removed the products of the land, the relief will be denied, the remedy at law being ample and complete for the recovery of the premises.[5]

§ 263. As we have before seen, he who seeks the aid of equity for protection in the possession and enjoyment of real property must make a clear and satisfactory showing of his right in order to entitle himself to protection by injunction.

[1] Boinay v. Coats, 17 Mich. 411.

[2] Tomlinson v. Rubio, 16 Cal. 202.

[3] Schlecht's Appeal, 60 Pa. St. 172; Pfeltz v. Pfeltz, 14 Md. 376; Tomlinson v. Rubio, 16 Cal. 202; Tevis v. Ellis, 25 Cal. 515.

[4] Schlecht's Appeal, 60 Pa. St. 172.

[5] Pfeltz v. Pfeltz, 14 Md. 376.

But where the *gravamen* of the case is that defendant has fraudulently purchased complainant's real estate at a sheriff's sale for a merely nominal consideration, it is a sufficient compliance with the rule if complainant states his right or interest in such manner as to authorize him to complain of the fraud and to obtain relief against it.[1]

§ 264. An injunction will never be granted for the mere purpose of correcting irregularities and mistakes in proceedings at law which can be remedied in the ordinary tribunals. And where the heirs at law have brought suit to recover possession of real estate equity will not enjoin their proceedings at the instance of a devisee under a lost will which has been insufficiently proved. The proper remedy in such a case is for the devisee to retrace his steps and correct his errors in the probate court where they were made, since equity will not sit in review of the errors and irregularities of other tribunals.[2]

§ 265. Quiet and uninterrupted possession of land for a long period of years constitutes strong ground for the interference of equity to protect the owner in the possession and enjoyment of his property against unauthorized disturbance and interruption without due process of law. And where one has been in the peaceable and uninterrupted enjoyment of his premises for twenty-five years, and a municipal corporation, under pretense that his improvements encroach upon a public highway, enters upon or disturbs the owner in the possession of his premises, an injunction may be awarded until the corporation shall have established its right to the ground in question by due course of law.[3]

[1] Outcalt *v.* Disborough, 2 Green Ch. 214. But the injunction in this case was dissolved on the ground that the answer fully denied the equity of the bill.

[2] Clarke *v.* Clarke, 7 R. I. 45.

[3] Varick *v.* New York, 4 Johns. Ch. 53. The grounds upon which the jurisdiction rests in such cases is laid down by the chancellor as follows: "The principle upon which the injunction so modified is to be upheld is, that after a claim of right accompanied with actual and constant possession for twenty-five years and upwards, the corporation of New York can not be permitted without due process of law to enter upon the possession of the plaintiff, and pull down buildings, fences, etc., under their right to regulate highways."

III. Of Judicial Sales where Judgment Debtor has no Title.

§ 266. Want of title in judgment debtor not usually ground for injunction.
267. Questions of title should be tried at law.
268. Distinction between legal and equitable title.

§ 266. It not unfrequently happens that sales of real estate are attempted under judicial process against one who has no title to the property levied upon. While the cases upon this subject are far from reconcilable, the clear weight of authority is in favor of the proposition that, in the absence of fraud or gross injustice and irremediable injury, courts of equity will not entertain jurisdiction in restraint of judicial sales under executions against third parties having no title to the property sold. The rule as thus stated is but a corollary of the proposition that equity will not grant relief where ample redress can be had at law, and the injuries resulting from a sale of one's property under execution being generally remediable in courts of law, such sales will not usually be enjoined.[1] Thus, a sale of lands under execution will not be enjoined at the instance of a third person claiming title who alleges no fraud and does not show that his rights will be prejudiced or that gross and irreparable mischief will result from allowing the sale to proceed.[2]

§ 267. In support of the rule as above laid down it is to be

[1] Hall *v.* Davis, 5 J. J. Marsh. 290; Watkins *v.* Logan, 3 Monr. 21; Bouldin *v.* Alexander, 7 Monr. 425; Coughron *v.* Swift, 18 Ill. 414; Freeman *v.* Elmendorf, 3 Halst. Ch. 475, affirmed on appeal to the Court of Errors, Ib. 655; Henderson *v.* Morrill, 12 Tex. 1; Carlin *v.* Hudson, Ib. 202. But see, *contra*, Brummel *v.* Hurt, 3 J. J. Marsh. 709; Downing *v.* Mann, 43 Ala. 266; McCulloch *v.* Hollingsworth, 27 Ind. 115; Bach *v.* Goodrich, 9 Rob. La. 391. In Bach *v.* Goodrich, and McCulloch *v.* Hollingsworth, the doctrine is laid down that the obligation of a grantor of real estate with covenants of warranty to defend the title of his grantee, constitutes such an interest as to make him a proper party to apply for an injunction against a sale of real estate to satisfy an execution against a third person.

[2] Henderson *v.* Morrill, 12 Tex. 1; Carlin *v.* Hudson, Ib. 202.

observed that questions of title are properly triable in a legal rather than an equitable forum, and no departure from the rule will be allowed except in cases of fraud or irreparable injury. And where a sheriff upon an execution against a judgment debtor is proceeding to sell real estate, the title to which is in dispute and claimed by another person, a court of equity will not enjoin, there being no especial equities requiring a departure from the usual rule of leaving the parties to their remedy at law.[1] Even where fraud is relied upon as the foundation for the relief the party complaining must show a definite injury to himself as the result of the fraud. And the purchaser of lands is not entitled to restrain their sale under a judgment obtained by fraud against his grantor without showing affirmatively that he will be injured by such sale.[2]

§ 268. In the application of the rule a distinction has been drawn between cases where the parties aggrieved possess the legal and where they possess the equitable title to the property about to be sold. The distinction is based upon the fact that in the case of legal ownership the remedy at law is ample, but where the title which it is sought to protect is merely an equitable title the courts of law can not give adequate redress; hence equity will entertain jurisdiction to grant relief against the sale.[3]

[1] Freeman v. Elmendorf, 3 Halst. Ch. 475, affirmed on appeal, Ib. 655.
[2] Marriner v. Smith, 27 Cal. 649.
[3] Orr v. Orr, 3 J. J. Marsh. 269.

IV. Cloud upon Title.

§ 269. Foundation of the jurisdiction.
270. Difficulty of establishing test.
271. Judgment already satisfied.
272. Distinction between cases where defect is and where it is not apparent on the record.
273. Special legal remedies a bar to relief in equity.
274. Possession under tax deeds.
275. *Bona fide* purchaser for value entitled to injunction.
276. Improper assessment for street improvements.
277. Of lands not patentable.

§ 269. The prevention of a cloud upon title is a salutary branch of the jurisdiction of equity, recognized by all the authorities and founded upon the clearest principles of right and justice. The jurisdiction by injunction to prevent a cloud upon title is closely analogous to the well-settled jurisdiction of courts of chancery for the removal of cloud upon title; and the reasoning which supports the jurisdiction in the latter case would seem to apply with equal if not greater force in the former. It seems, therefore, to follow as a necessary consequence that if the aid of equity may be invoked to remove a cloud upon title to realty, it may with equal propriety be exerted to enjoin such illegal acts as will necessarily result in a clouded title.[1] And it may be asserted as a general proposition, that a sale of lands under execution which would confer no title upon the purchaser and whose only effect would be to cloud the title of others will be enjoined.[2]

[1] Pettit *v.* Shepherd, 5 Paige, 493; Christie *v.* Hale, 46 Ill. 117; Oakley *v.* Trustees etc., 6 Paige, 262. But see, *contra*, Armstrong *v.* Sanford, 7 Minn. 49; Montgomery *v.* McEwen, 9 Minn. 103.

[2] Bank of U. S. *v.* Schultz, 2 Ohio, 471; Norton *v.* Beaver, 5 Ohio, 178; Christie *v.* Hale, 46 Ill. 117; Key etc. *v.* Munsell, 19 Iowa, 305; Pixley *v.* Huggins, 15 Cal. 127. And see Pettit *v.* Shepherd, 5 Paige, 493; Oakley *v.* Trustees etc., 6 Paige, 262. It is not necessary that the sale should divest complainant of his title to warrant equity in interfering; it is sufficient

§ 270. It is difficult to establish any exact test which will be applicable in all cases to determine what constitutes such a cloud upon title as to authorize a court of equity to interfere for its prevention. It has been held, however, that if the sale which it is sought to restrain is such that in an action of ejectment brought by the purchaser under the sale the real owner of the property would be obliged to offer evidence to defeat a recovery, then such a cloud would be raised as to warrant the interference of equity to prevent the sale.[1]

§ 271. An attempt to enforce a judgment already satisfied may sometimes cast such a cloud upon the title of the judgment debtor as to warrant equity in interfering for the protection of other creditors whose claims are established by judgment. Thus, where a prior judgment creditor has received full payment and satisfaction of his judgments, but still keeps them on foot and attempts to enforce executions thereunder to the prejudice of a junior judgment creditor, he thereby casts such a cloud upon the title to the debtor's estate as to lay the foundation for an injunction in behalf of the junior creditor.[2]

§ 272. In the exercise of the jurisdiction for the prevention of cloud upon title, a distinction is drawn between cases where the invalidity or illegality charged as the cloud is shown by evidence *dehors* the record, and where it appears upon the face of the proceedings themselves. And while in the former case the relief is freely granted, in the latter courts of equity will not interpose. Thus, where a question concerning the partition of lands has been referred to arbitration, if the award for the partition is invalid upon its face no such cloud will result as to warrant equity in enjoining the proceedings.[3] And to authorize the interference in this class of cases it is

that it simply operates to cloud his title. And the fact that the levy was only made upon the "right, title and interest" of complainant in the injunction suit will not avail against granting the injunction. Key etc. v. Munsell, 19 Iowa, 305.

[1] Pixley v. Huggins, 15 Cal. 127.

[2] Shaw v. Dwight, 16 Barb. 536.

[3] Meloy v Dougherty, 16 Wis. 269.

held that the title of the party complaining being shown as it appears of record, the cloud to be removed must be apparently a good title as against that of complainant, though really defective by reason of something not appearing of record. Where, therefore, the cloud which it is sought to remove can only be shown to be a good title by leaving that of complainant out of the question, an injunction will be refused.[1]

§ 273. Since the interference for the prevention of a cloud upon title grows out of the inadequacy of the remedy at law, it follows that where special legal remedies are provided sufficiently efficacious to meet the exigencies of the case and prevent the injury complained of, no injunction will be allowed, and the parties will be left to pursue the remedy provided at law. Thus, a sheriff's sale of real estate under execution will not be enjoined on the ground that it would pass no title and might impair the rights of the real owner by clouding his title, where under the peculiar judicial system of the state ample remedy may be had at law.[2]

[1] Moore *v.* Cord, 14 Wis. 213; Gamble *v.* Loop, Ib. 465.

[2] Drake *v.* Jones, 27 Mo. 428. This was an application for an injunction to restrain a sheriff's sale of real estate under an execution on the ground that it would pass no title and might impair the rights of the real owner by clouding his title. The relief was denied, the court, Richardson, J., saying: "If the effects of a sale under the defendant's execution, whilst it passed no interest, would cast a hurtful doubt on the plaintiff's title, which he could only remove by evidence *in pais*, and the purchaser could stand by indefinitely and refuse to litigate his right until the evidence to repel it might be lost and the plaintiff less able to contest it, and in the meantime the true owner be unable to sell and afraid to improve, and thus be denied the full dominion over his property, then the exercise of the power of the court by the writ of injunction would be properly invoked as a means of preventing injury and of precautionary justice. But our law has disarmed a person having no title of the power by false clamor to injure the title of another in that way. In the first place, provision is made with minute particularity for perpetuating testimony; and then again, if the plaintiff is out of possession he may immediately bring his ejectment; but if he is in possession, and wishes to silence an adverse claimant, he may file a petition and compel him to bring an action to try the title, or be forever barred from claiming any right or title adverse to the petitioner. (R. C. 1855, p. 1241, § 62.) * * * Several of the authorities cited from other states, as to the power to enjoin in cases like the

§ 274. Where a bill is filed against a party in possession of lands under tax deeds to have such deeds declared void as a cloud upon the title, and praying an injunction to restrain the commission of waste, complainant not being in possession, and not having established his title to the premises at law, and showing no privity of estate and no action of ejectment pending to try the title, the bill will be dismissed for want of equity.[1]

§ 275. A *bona fide* purchaser of real estate for a valuable consideration may restrain a sale of the property under execution when he has purchased after the rendition of the judgment but before the execution was delivered to the sheriff, the judgment not being a lien upon the property, since such sale would operate as a cloud upon his title.[2] And where an execution creditor is proceeding unlawfully to sell the homestead interest of his debtor he may be enjoined upon the same ground.[3]

§ 276. Where land has been improperly assessed for benefits arising from the opening of streets, the commissioners having proceeded irregularly and illegally in condemning the property, a court of equity may interpose by injunction for the purpose of preventing a cloud upon title, such a case being properly distinguishable from a sale of personal property where ample remedy can be had at law.[4]

§ 277. An injunction will not be granted to restrain the issuing of a patent for lands where such patent can not by any possibility cast a cloud upon complainant's title, the lands in question being tide lands and not patentable, although the patent if issued would be invalid and would require evidence *dehors* the record to establish its invalidity.[5]

present one, seem to be in point; but our system is different from theirs, and we think that sound policy requires us to deny the relief the plaintiff seeks in the form and at the time it was asked." And similar doctrine is held in Kuhn *v.* McNeil, 47 Mo. 389.

[1] Blackwood *v.* Van Vleet, 11 Mich. 252.

[2] Martin *v.* Hewitt, 44 Ala. 418.

[3] Tucker *v.* Kenniston, 47 N. H. 267.

[4] Leslie *v.* St. Louis, 47 Mo. 474.

[5] Taylor *v.* Underhill, 40 Cal. 471.

V. Of Injunctions to restrain the Collection of Purchase Money on Failure of Title.

§ 278. Unsettled state of the authorities.
279. Vendor's fraud sometimes a ground for injunction.
280. Purchaser in possession with warranty can not enjoin collection of purchase money.
281. Knowledge of defect in title by vendor.
282. Where possession has not been given injunction may be allowed.
283. Outstanding incumbrances no ground for injunction.
284. Pendency of action of ejectment.
285. Where conveyance has not been given injunction may be allowed.
286. Recovery barred by statute of limitations.
287. Sales of hazard.
288. Special stipulations.
289. Cases where vendee relies upon vendor's representations.
290. Conflict of authority.
291. Cases where defect of title has been held sufficient ground for the injunction.
292. Failure of consideration.
293. Vendor's insolvency a ground for relief.
294. Inability to defend at law.
295. Judicial sales.
296. Violation of vendor's agreement.
297. Possession without conveyance.
298. Failure of vendor to procure outstanding title.
299. Where remedy at law is inoperative.
300. Duty of vendor seeking a dissolution.
301. Injunction rarely perpetuated.
302. Purchaser with knowledge of defect can not enjoin.
303. Rescission of contract by purchaser.
304. Effect of special contracts.
305. Difficulty of obtaining title no ground for relief.
306. Injunction not allowed because of unliquidated damages.
307. Purchaser must use diligence in availing himself of his remedy at law.
308. Damages on dissolution.

§ 278. Upon no branch of the jurisdiction of equity by injunction, save that in restraint of taxation, are the authorities more divergent and irreconcilable than in cases where the relief has been invoked to restrain the collection of unpaid

purchase money of real estate because of failure of title. While upon the one hand, courts of the highest authority have denied the relief in cases where the grounds relied upon might have been urged in defense of an action at law for the purchase money, and in cases where the parties complaining were in possession under covenants of warranty have held the proper remedy to be at law upon the covenants contained in the deed, courts of equal authority and respectability have, upon the other hand, contended strenuously in similar cases for the exercise of the jurisdiction in equity to restrain the collection of the purchase money. In this unsettled state of the authorities it is exceedingly difficult, if not impossible, by any process of generalization, to deduce from the decided cases principles of general application which shall serve as rules for the guidance of courts and practitioners. The most that can be attempted is to group together the adjudications both for and against the exercise of the jurisdiction, together with the reasoning upon which the decisions are based.

§ 279. It will be found upon investigation that many, though by no means all of the decisions in favor of the jurisdiction in restraint of the collection of purchase money rest upon the ground of fraudulent or deceitful conduct upon the part of the vendor. The relation of vendor and vendee of real property being considered a confidential relation, the suppression by the vendor of a knowledge of fatal defects in the title of the property conveyed constitutes such fraud as will authorize the interference of equity to prevent the collection of the purchase money, notwithstanding the remedy at law for breach of covenants of title, if the vendor be insolvent so that a judgment against him would be worthless.[1] Accordingly it has been held where the vendor had disguised from the vendee the fact that his only title was a bond for a conveyance from a person since deceased, that a note for an unpaid balance of purchase money might be enjoined even in the hands of a third person, who, however, had not received it in

[1] Ingram *v.* Morgan, 4 Humph. 66. And see Yonge *v.* McCormick, 6 Fla. 368.

due course of trade, but had taken it in payment of a pre-existing debt and without indorsement.[1]

§ 280. Where the purchaser of land is in actual possession under covenants of warranty, the better doctrine seems to be that he is not entitled to an injunction against the collection of purchase money on the ground of failure of consideration resulting from want of title. Possession having been taken under the deed and there being no eviction at law under a paramount title, the remedy must be had at law upon the covenants in the deed in the absence of fraudulent and wilful misrepresentations as to vendor's title. In such cases eviction at law is regarded as an indispensable part of the purchaser's claim to relief in equity, and he being still in possession under covenants of warranty no injunction should be allowed.[2] And in no event will mere general allegations of failure of title or

[1] Id. And see Clarke *v.* Hardgrove, 7 Grat., *infra*.

[2] Bumpus *v.* Platner, 1 Johns. Ch. 213: Abbott *v.* Allen, 2 Johns. Ch. 519; Gayle *v.* Fattle, 14 Md. 69; Beale *v.* Seiveley, 8 Leigh, 658; Wilkins *v.* Hogue, 2 Jones Eq. 479; Elliott *v.* Thompson, 4 Humph. 99; Senter *v.* Hill, 5 Sneed, 505; Truly *v.* Wanzer, 5 How. 141. In Bumpus *v.* Platner, 1 Johns. Ch. 213, an injunction was sought against proceedings under a bond and mortgage given for purchase money, on the ground of failure of consideration consisting in defective title, the complainant being in undisturbed possession under covenants of warranty. The relief was denied, Kent, Chancellor, saying: "I apprehend it may be safely said that there is no case of relief on this ground, when possession has passed and continued, without any eviction at law, under a paramount title. Platner conveyed to the plaintiffs, with a covenant of warranty, and he is bound to defend their title at law; and *non constat*, that he is not able and willing to do it. There was a case under Lord Nottingham (2 Ch. Cas. 19, Anon.), in which the purchaser was relieved from the payment of the purchase money; but he had already lost the land, by eviction, under a better title. If the title fails, in this case, the plaintiffs can resort to the covenants in their deeds for their indemnity. I consider an eviction at law an indispensable part of the plaintiff's claim to relief here, on the mere ground of failure of consideration." But see, *contra*, Clarke *v.* Hardgrove, 7 Grat. 399; Koger *v.* Kane, 5 Leigh, 606; Bartlett *v.* Loudon, 7 J. J. Marsh. 641; Yonge *v.* McCormick, 6 Fla. 368; Gay *v.* Hancock, 1 Rand. 72; Miller *v.* Argyle's Ex'r., 5 Leigh, 460; Bullitt's Ex'rs. *v.* Songster's Adm'rs., 3 Munf. 55; Dorsey *v.* Hobbs, 10 Md. 412; Buchanan *v.* Lorman, 3 Gill. 51.

of defective title authorize a court of equity in enjoining a judgment for purchase money.[1]

§ 281. To enable equity to relieve a vendee in possession under covenants of warranty by enjoining the collection of purchase money on the ground of defective title, it must clearly appear that the vendor knew of the defect in the title which the purchaser had no means of discovering and that he fraudulently suppressed this knowledge. Where this does not appear and no suit is either prosecuted or threatened against the vendee for the property in question no injunction will be allowed.[2] In conformity with this principle it is held that the fears and apprehensions of the vendee that his title may prove defective will in no case warrant the interference of equity where he is still in undisturbed possession of the property.[3] And where the alleged defects do not amount to a total failure of consideration, and there has been no disturbance or eviction, and no suit brought by an adverse claimant, relief by injunction will be withheld.[4]

§ 282. Where the purchaser of land has never been placed in possession there seems to be stronger reason for allowing relief in equity against enforced payment of the purchase money.[5] Thus, an injunction has been allowed against a judgment on a bond for purchase money where possession of the property was not given at the time stipulated and where no conveyance had been made to the vendee. Under such circumstances the vendee having received no conveyance is deprived of the legal remedy which he might have enforced upon the covenants of a deed had one been given.[6] So a suit for purchase money has been enjoined where the land was in the adverse possession of a third party having title to a portion of it, even though this fact were known to the purchaser at the

[1] French v. Howard, 3 Bibb, 301.
[2] Beale v. Seiveley, 8 Leigh, 658.
[3] Truly v. Wanzer, 5 How. 141.
[4] Hile v. Davison, 5 C. E. Green, 228.
[5] Hilleary v. Crow, 1 Har. & J. 542; Nelson v. Owen, 3 Ired. Eq. 175.
[6] Hilleary v. Crow, 1 Har. & J. 542.

time of the contract, vendor having at that time agreed to put vendee in possession, which he has failed to do, and the answer admitting his inability to put him in possession.[1]

§ 283. Outstanding incumbrances or an outstanding equitable title will not warrant a court of equity in enjoining the collection of purchase money in behalf of a purchaser who is in peaceable possession under covenants of warranty.[2] And where the buyer has a full and ample remedy at law on his covenants of quiet enjoyment he can not sustain a bill for an injunction on the ground of defect of title but will be left to pursue his remedy at law.[3]

§ 284. While, as we have already seen, mere general averments of defective title, or the fears and apprehensions of a purchaser that the title will prove defective, will not warrant a court of equity in extending relief,[4] yet it would seem that if the title is actually called in question by an action of ejectment there is sufficient ground for restraining a recovery of the purchase money until the proceedings in ejectment are disposed of.[5] Though even in such case it has been held necessary to charge in the bill that the claim of title on which the ejectment proceedings are founded is a valid one. And an injunction has been refused against a sale of real estate under a mortgage given to secure purchase money where the relief was sought on the ground that a third party had instituted proceedings in ejectment to recover the property, there being no allegation in the bill that the claim of title on which ejectment was brought was well founded.[6] In other words, a mere claim of paramount title by a third person and his bringing suit upon such claim against the vendee will not authorize an injunction against the vendor who has warranted the title to restrain him from proceeding to collect unpaid purchase money.[7]

[1] Nelson v. Owen, 3 Ired. Eq. 175.
[2] Elliott v. Thompson, 4 Humph. 99; Senter v. Hill, 5 Sneed, 505.
[3] Wilkins v. Hogue, 2 Jones Eq. 479.
[4] French v. Howard, 3 Bibb, 301; Truly v. Wanzer, 5 How. 141.
[5] Johnson v. Gere, 2 Johns. Ch. 546.
[6] Gayle v. Fattle, 14 Md. 69.
[7] Id.

§ 285. Where no conveyance has been given of the property contracted to be sold there are stronger equities in support of the relief by injunction than where the land has actually been conveyed, since the purchaser, having no covenants of warranty on which to enforce a remedy at law, is compelled to resort to equity for relief against an injury which might otherwise prove irreparable. Thus, where one under pretense of title in himself assumes to sell land, taking bonds for the purchase money, but in reality having no title and giving no conveyance, he may be enjoined from attempting to enforce the collection of the bonds, complainant being required to surrender possession of the premises as a condition precedent to obtaining relief.[1] And where the vendor of real estate executed a bond for title and the purchaser executed a bond for the purchase price at the same time, the acts being concurrent acts and to be performed at one and the same time, it is error to dissolve a preliminary injunction against a judgment obtained by vendor for the purchase money, he having failed to execute a conveyance as required by his bond, and the injunction should be perpetuated to the hearing.[2]

§ 286. But where a vendee enters under a title bond from his vendor and holds the land under such title until the statute of limitations would bar a recovery by an adverse claimant, he will not be allowed to set up a defect of title in his vendor existing at the time of sale to him as a ground of injunction against a judgment for the purchase money.[3]

§ 287. Where a purchaser of land has accepted a conveyance without warranty of title, it has been held that an injunction would not lie against unpaid purchase money in the absence of fraud or concealment on the part of the vendor concerning the title.[4] Such a purchase may properly be termed a sale of hazard and it may be laid down as a general rule that in sales of hazard equity will not interpose in the

[1] Brannum *v.* Ellison, 5 Jones Eq. 435.
[2] Brittain *v.* McLain, 6 Ired. Eq. 165.
[3] Amick *v.* Bowyer, 8 West Va. 7.
[4] Price's Ex'rs. *v.* Ayres, 10 Grat. 575.

absence of fraud or misrepresentation.[1] Thus, where a sale of land is made in gross, the contract being one of hazard on both sides, the purchaser is not entitled to relief in equity in case of a deficiency in the amount.[2] And where the purchase is, as to the title, one of hazard, there being no fraud or concealment concerning the title by the vendor, a judgment for the purchase money will not be enjoined, even though the vendor represented the title as good when it was defective, his representations having been made in good faith.[3] In such cases the purchaser having accepted the land without any agreement, either express or implied, for a conveyance with warranty, is regarded as having taken upon himself all risk as to the title and he is therefore debarred from relief in a court of equity.[4]

§ 288. The question as to whether equitable relief shall or shall not be given in a particular case may sometimes be determined by the nature of special stipulations made by the parties at the time of sale. Thus, where vendees contract at the time of purchase that their payments shall be made promptly and shall not be withheld when due for want of a conveyance, such agreement is sufficient, in the absence of fraud, to warrant a court of equity in denying relief by injunction against a judgment for payment which vendees have refused to make on account of defective title.[5]

§ 289. While in case of a sale of land in gross, the contract being one of hazard on both sides, equity will not, as we have already seen, interfere in aid of the purchaser on account of a deficiency in the amount of land conveyed,[6] yet where

[1] Keyton v. Brawford, 5 Leigh, 39; Carrico v. Froman, 2 Lit. 178; Sutton v. Sutton, 7 Grat. 234.

[2] Keyton v. Brawford, 5 Leigh, 39.

[3] Sutton v. Sutton, 7 Grat. 234; Carrico v. Froman, 2 Lit. 178. In the latter case the vendee had contracted in his bond for the purchase money that it should not be withheld by bill in chancery or otherwise if any adverse claims should be made to the land in question; the effect of this stipulation is not touched upon by the court in deciding the cause.

[4] Sutton v. Sutton, 7 Grat. 234.

[5] Lucas v. Chapeze, 2 Lit. 31. And see Carrico v. Froman, 2 Lit. 178.

[6] Keyton v. Brawford, 5 Leigh, 39.

the purchaser has relied upon the vendor's representations as to the amount of land the case is somewhat different. And a vendee who is not yet in possession may enjoin a judgment for the purchase money on the ground of deficiency in the amount where he has made the purchase relying entirely upon vendor's representations as to the amount, which representations prove to be false.[1] So where three separate tracts of land are sold, the title proceeding through as many separate sources or deeds, one of which entirely fails, so that the vendor could have had no authority to sell that tract, and there is a deficiency in the remaining tracts, a judgment for the purchase money may be enjoined to the extent of the deficiency in the land.[2] Under such circumstances the relief is granted, not because of a deficiency in the amount conveyed, but because of an entire failure as to one tract, the land specified having in reality no existence.[3]

§ 290. We have already considered the doctrine that the purchaser of real estate in actual and peaceable possession under covenants of warranty will not be allowed to enjoin the collection of the purchase money on account of defective title. The authorities supporting that proposition are based upon the universally-recognized rule that equity will never interpose for the purpose of granting relief which may be had in the courts of law, and the vendee being in the enjoyment of undisturbed protection can find ample redress for any defect in title or disturbance of his possession by an action at law upon the covenants in his deed. Notwithstanding the array of respectable authorities in support of this rule, there are other cases, neither few in number nor wanting in authority, which have held a doctrine directly opposed to this, and the courts have freely exercised the jurisdiction even though the purchaser was protected by the covenants in his deed. We will proceed to a consideration of these cases and, as far as may be, of the reasoning upon which they are based.

§ 291. The doctrine has been broadly laid down that the

[1] Lee *v.* Vaughan, Ky. Dec. 238.
[2] Strodes *v.* Patton, 1 Marsh. Dec. 228.
[3] Id.

purchaser of real estate with general warranty is entitled to an injunction against the payment of the purchase money upon proof of an actual, outstanding, superior title in a third person, or of fatal defects in the title of his grantor.[1] Thus, where land is sold with covenants of warranty and a deed of trust given to secure the payment of the purchase money, discovery of an adverse claim to the land has been held sufficient to warrant a court of equity in enjoining a sale under the trust deed until the cloud resting on the title is removed.[2] Nor is the right of the purchaser to an injunction on the ground of defective title impaired by the circumstance of the vendor seeking to collect the unpaid purchase money from a third person on a collateral security assigned to such person by the purchaser.[3]

§ 292. Equitable relief has been allowed for the protection of a purchaser where the consideration for a contract of sale has entirely failed, the vendor having stripped himself of all title to the premises, legal or equitable, and being in no condition to comply with his contract to convey. In such case neither the vendor nor his assignees standing in his stead will be allowed to recover the purchase money and a judgment on a bond for such money will be perpetually enjoined.[4] And where vendor at the time of making his agreement to convey was without title to the premises an injunction may be allowed against proceedings at law upon the bond, the contract being treated as an unexecuted one until vendee has received that for which he has contracted.[5]

[1] Gay *v.* Hancock, 1 Rand. 72; Miller *v.* Argyle's Ex'r., 5 Leigh, 460; Clarke *v.* Hardgrove, 7 Grat. 399; Koger *v.* Kane, 5 Leigh, 606; Dorsey *v.* Hobbs, 10 Md. 412; Yonge *v.* McCormick, 6 Fla. 368; Bullit's Ex'rs. *v.* Songster's Adm'rs., 3 Munf. 55; Swain *v.* Burnley, 1 Mo. 286 (2 edition). But see, *contra*, Bumpus *v.* Platner, 1 Johns. Ch. 213; Abbott *v.* Allen, 2 Johns. Ch. 519; Gayle *v.* Fattle, 14 Md. 69; Beale *v.* Seiveley, 8 Leigh, 658; Wilkins *v.* Hogue, 2 Jones Eq. 479; Elliott *v.* Thompson, 4 Hump. 99; Senter *v.* Hill, 5 Sneed, 505; Truly *v.* Wanzer, 5 How. 141.

[2] Gay *v.* Hancock, 1 Rand. 72. And see Miller *v.* Argyle's Ex'r., 5 Leigh, 460.

[3] Clarke *v.* Hardgrove, 7 Grat. 399. And see Ingram *v.* Morgan, 4 Hump. 66.

[4] Buchanan *v.* Lorman, 3 Gill, 51.

[5] Dorsey *v.* Hobbs, 10 Md. 412.

§ 293. Where defendant is in possession with general warranty, even though the title has not been questioned by suit either prosecuted or threatened, it is held that he may enjoin the collection of the purchase money on proof of defective title if the vendor through insolvency is unable to respond in damages in an action upon the covenants of warranty.[1] In such case the legal remedy being insufficient on account of vendor's insolvency, a court of equity would seem to be the only source to which resort can be had to redress an injury which might otherwise prove irreparable.

§ 294. And where from the circumstances of the case and through fraud on the part of vendor the vendee was unable to defend against the action at law for the purchase money an injunction may properly be allowed. Thus, the relief has been granted where a purchaser had been deceived by the vendor's false and fraudulent representations as to his title, and where, by relying on such representations, the purchaser was kept in ignorance of the defective title until after judgment was obtained.[2]

§ 295. The authorities are undecided as to whether relief by injunction in cases of defective title may be extended to enforced sales under judicial process. Upon the one hand, it has been held that where the purchaser of land at a sale under execution has given a bond for the purchase price he may restrain the enforcement of the bond on showing that defendant in execution had no title to the land sold, the purchaser having acted in good faith.[3] Upon the other hand, it has been held that a purchaser at a judicial sale can only obtain relief on the ground of defective title by resisting the confirmation of the sale in the proceedings at law wherein such sale was ordered, and he is not entitled to enjoin a judgment on his bond for the purchase money.[4]

§ 296. It may sometimes happen that the vendor has by his own agreement placed himself in such position that it

[1] Yonge v. McCormick, 6 Fla. 368.
[2] Fitch v. Polke, 7 Blackf. 564.
[3] Bartlett v. Loudon, 7 J. J. Marsh. 641.
[4] Threlkelds v. Campbell, 2 Grat. 198.

would be inequitable to allow him to proceed at law for the collection of purchase money. Thus, where he has entered into a contract under seal with the vendee that he will not bring suit upon the bond given in security for part of the purchase price until the quantity of the land shall be definitely ascertained, and in violation of his agreement has instituted proceedings at law for a recovery upon the bond before the quantity of the land has been ascertained, it has been held that the proceedings upon the bond might be perpetually enjoined.[1]

§ 297. Though a court of equity may properly refuse relief by injunction against a judgment for unpaid purchase money in the absence of fraud where the purchaser is in possession under a conveyance from his grantor with covenants of general warranty, yet if his possession is merely under a title bond or a covenant to convey and the title prove defective judgment for the unpaid money may be enjoined. In such case the vendee being unprotected by covenants of warranty has no sufficient remedy at law and is compelled to seek relief in a court of equity.[2]

§ 298. Failure of the vendor to comply with his agreement to procure a relinquishment of outstanding titles or interests in the land conveyed has sometimes been held sufficient ground for the interference of equity by injunction.[3] Thus, where the vendor has contracted to procure a conveyance to the vendee of the title of other joint owners of the premises, but fails to do so, he may be enjoined from enforcing a judgment upon vendee's bond for the purchase price, even though the vendee himself procures the remainder of the title from the other owners direct.[4] So the failure of the grantor to procure a relinquishment of his wife's dower, which he had agreed to do when the purchaser accepted his conveyance, has been held sufficient ground for enjoining a judgment for the

[1] Bullitt's Ex'rs. v. Songster's Adm'rs., 8 Munf. 55.
[2] Buchanan v. Alwell, 8 Humph. 516.
[3] McKoy v. Chiles, 5 Monr. 259; Jaynes v. Brock, 10 Grat. 211.
[4] Jaynes v. Brock, 10 Grat. 211.

purchase money.[1] But an injunction granted under such circumstances will be dissolved on vendor afterward procuring a release of the wife's dower, though the writ having been properly granted in the first instance no damages will be allowed upon its dissolution.[2]

§ 299. The fact that the remedy at law against the grantor with covenants of warranty is inoperative affords strong ground for relief in equity against payment of purchase money. And where the grantor is a non-resident and has not sufficient property in the state to satisfy a judgment in damages for breach of his covenants of warranty, the injunction may be allowed on proof of defective title, especially where the purchaser has not yet obtained possession of that portion of the land to which the title is defective, it being held adversely.[3] Courts of equity will not, however, interfere in behalf of a purchaser unless the title is questioned by a suit either prosecuted or threatened, or unless the purchaser can clearly show that the title is defective.[4]

§ 300. Where the vendor of real estate who has been enjoined from collecting the purchase money on account of defective title seeks a dissolution of the injunction the burden is thrown upon him of establishing a good title.[5] And in such case the vendor will be required to produce his title to the court in order that it may be satisfied of its sufficiency to warrant a dissolution of the injunction.[6] Nor will the purchaser be required to accept a conveyance from a third person to perfect the title, he being protected by his covenants of warranty from vendor.[7]

§ 301. While, as we have seen in the preceding sections,

[1] McKoy v. Chiles, 5 Monr. 259.

[2] Id. And see as to refusal of damages on dissolution of an injunction properly granted to restrain payment of purchase money, Porter v. Scobie, 5 B. Monr. 387: Lampton v. Usher's Heirs, 7 B. Monr. 57; Fishback v. Williams. 3 Bibb, 342.

[3] Richardson v. Williams, 3 Jones Eq. 116.

[4] Ralston v. Miller, 8 Rand. 44.

[5] Moredock v. Williams, 1 Overt. 325; Moore v. Cook, 2 Hayw. Tenn. 84.

[6] Moredock v. Williams, 1 Overt. 325.

[7] Moore v. Cook, 2 Hayw. Tenn. 84.

the jurisdiction in restraint of the payment of purchase money is freely exercised, a perpetual injunction will rarely be granted and equity will only extend its protection until the defective title is cured, or until the purchaser can pursue his remedy at law on his covenants of warranty.[1] And if the purchaser under a general warranty, who has procured a preliminary injunction, fails to prosecute his legal remedy on his covenants of warranty within a reasonable period the injunction will be dissolved.[2] So where the vendee has obtained an injunction on the ground of defective title the vendor is entitled to a dissolution on curing the defect by a conveyance of the outstanding title, even though there be general allegations in the bill of other outstanding title, such allegations being unsupported by proof.[3] And a vendee who has obtained an injunction against a judgment for purchase money of real estate is not entitled to have his injunction perpetuated and to have the benefit of his purchase at the same time.[4]

§ 302. The relief in this class of cases resting principally upon fraud on the part of the vendor, the jurisdiction will not be exercised in favor of one who buys with full knowledge of a defective title, since in such case he assumes all risk as to the condition of the title and is not misled by fraudulent representations on the part of the grantor.[5] And one who purchases real estate knowing at the time of purchase that the title is doubtful, will not be permitted after taking possession of the premises to enjoin a judgment for the purchase money on the ground of defective title and because his conveyance proves to be of a life estate instead of the fee simple. In such case the vendor will be decreed to make a conveyance

[1] Lovell v. Chilton, 2 West Va. 410; Swain v. Burnley, 1 Mo. 286 (2 edition). Though it has been held that a dissolution should never be allowed until the tender of a good and sufficient title, and that if allowed before vendor has made good the title the injunction should be reinstated. Grantland v. Wight, 2 Munf. 179.

[2] Swain v. Burnley, 1 Mo. 286 (2 edition).

[3] Lovell v. Chilton, 2 West Va. 410.

[4] Markham v. Todd, 2 J. J. Marsh. 364; Edwards v. Strode, Ib. 506.

[5] Williamson v. Raney, Freem. Ch. 112.

of the fee and the purchaser will be left to his remedy at law on his covenants of warranty.[1]

§ 303. The question of whether the jurisdiction will be exercised where the purchaser does not offer to rescind the contract and restore possession to the grantor may still be regarded, owing to the unsettled state of the authorities, as an open question. The doctrine has been broadly asserted that the purchaser in possession seeking to enjoin payment of the purchase money on the ground of failure of title, will in no event be allowed relief where he does not pray a rescission of the contract or offer to restore possession to the grantor.[2] Upon the other hand, it has been held that an injunction will lie on the ground of failure of title even though no offer is made by the party complaining to rescind the contract of sale.[3] Indeed a still broader doctrine has been asserted and it has been held that a deficiency in the quantity of land sold, if discovered before the purchase money is all paid, while it will warrant an injunction, does not constitute a sufficient ground for rescinding the contract where the vendor is guilty of no fraud and has sold without warranty.[4]

§ 304. In conformity with the general rule denying relief in equity on grounds which might have availed in defense of an action at law, an injunction against a judgment for purchase money will not be sustained because of a dispute concerning title where by the terms of the contract the purchaser is not obliged to pay the final installment until the question of disputed title shall be determined. The purchaser under such contract having failed to avail himself of his defense in the suit at law for the final installment of the purchase price, is by his own negligence barred from relief in equity.[5] And where by the terms of the contract of sale the purchaser is not to receive title until full payment is made

[1] Merritt v. Hunt, 4 Ired. Eq. 406.

[2] Williamson v. Raney, Freem. Ch. 112; Jackson v. Norton, 6 Cal. 187 And see Markham v. Todd, 2 J. J. Marsh. 364.

[3] Warren v. Carey, 5 Ind. 319.

[4] Moredock v. Rawlings, 3 Monr. 73.

[5] Allen v. Philips, 2 Lit. 1.

he will not be allowed to enjoin an action at law for the purchase money on the ground of failure of title where he has not offered to pay the money.[1]

§ 305. Mere difficulty in obtaining title resulting from the purchaser's own negligence will not warrant a court of equity in interposing for his protection where no especial blame attaches to the vendor. Thus a judgment for purchase money will not be enjoined because of difficulty in obtaining title from infant heirs of the vendor, the purchaser having neglected during the lifetime of vendor to make payment and obtain a conveyance.[2]

§ 306. It is a well-established principle that unliquidated damages can not be urged by way of set-off in proceedings in equity. In conformity with this principle it is held that a bill will not lie to enjoin an unpaid balance of purchase money whose real object is to obtain damages for an alleged fraud in the transaction. The object of such proceedings being simply to procure damages a court of law is the proper forum in which to seek relief.[3] And where an injunction is sought on the ground of unpaid taxes which constitute a lien on the premises, if the amount of the taxes is so small as to fall below the amount fixed by statute as the minimum of the jurisdiction of the court, the relief will be refused.[4]

§ 307. A purchaser seeking the aid of equity against the enforcement of the vendor's right to the purchase money on the ground of fraud, must use reasonable diligence in availing himself of whatever remedy he may have at law. And where a purchaser of realty, claiming that he was induced to purchase by false and fraudulent representations as to a never-failing spring upon the premises, neglects to pursue his legal remedy, either by recouping his damages in an action brought by the vendee for the balance of the purchase money, or by a

[1] Mitchell v. Sherman, Freem. Ch. 120.

[2] Prout v. Gibson, 1 Cranch C. C. 389. In this case the infant heirs were not made parties to the bill.

[3] Robertson v. Hogsheads, 3 Leigh, 667; Koger v. Kane, 5 Leigh, 606. And see Frieze v. Chapin, 2 R. I. 429.

[4] Reynolds v. Howard, 3 Md. Ch. 331.

separate action of his own for the fraud, he will not be allowed to restrain vendor from enforcing his judgment for the purchase money.[1]

§ 308. Since the question of damages on the dissolution of an injunction is dependent upon whether the jurisdiction was properly exercised upon sufficient cause in the first instance, it follows that where an injunction has been properly granted against a judgment for purchase money because of defective title to the premises conveyed and has been dissolved upon the title being perfected by the grantor, no damages should be allowed upon the dissolution.[2] In such cases the purchaser having properly invoked the aid of equity for the protection of his right should not be compelled to pay damages to the vendor who alone is in fault.

[1] Hall *v.* Clark, 21 Mo. 415.

[2] Fishback *v.* Williams, 3 Bibb, 342; McKoy *v.* Chiles, 5 Monr. 259; Porter *v.* Scobie, 5 B. Monr. 387; Lampton *v.* Usher's Heirs, 7 B. Monr. 57; Reeves *v.* Dickey, 10 Grat. 138. And the purchaser who obtains an injunction on the ground of defective title is entitled to costs, even though the title should afterward be made good. Reeves *v.* Dickey, 10 Grat. 138.

VI. Mortgages and Deeds of Trust.

§ 309. Sale under mortgage may be enjoined.
310. Deeds of trust.
311. Irreparable injury must be clearly shown.
312. Judgment in another county.
313. Mortgagor in possession may be restrained from committing waste.
314. Grounds of the jurisdiction.
315. Special cases.
316. Substantial injury must be shown.
317. Special cases.
318. Fraud.
319. Injunction not allowed merely to hinder sale.
320. Mistake a ground for the relief.
321. Foreclosure proceedings may be enjoined when mortgage has been satisfied.
322. Growing crops.
323. Mortgages of chattels.

§ 309. Courts of equity will sometimes interfere by injunction to restrain proceedings under a sale of mortgaged premises where such proceedings are against conscience and threaten irreparable injury.[1] Thus, where there is a dispute concerning the title to real estate which has been mortgaged to secure the purchase money, a sale of the property to satisfy the mortgage may be restrained if its enforcement would be against conscience and fair dealing and would entail great loss on the mortgagors.[2] So a temporary injunction has been awarded against a sale of mortgaged premises under a power of sale contained in the mortgage of which complainant, the assignee of the mortgagor, was ignorant when he purchased the premises, the mortgage never having been recorded.[3] And where property has been released from the terms of a mortgage, but, notwithstanding such release, it is afterward

[1] High etc. v. Grier, 4 Jones Eq. 132; Pierson v. Ryerson, 1 McCart. 181; Platt v. McClure, 3 Woodb. & M. 151.
[2] High etc. v. Grier. 4 Jones Eq. 132.
[3] Platt v. McClure, 3 Woodb. & M. 151.

sold under a decree in foreclosure, a perpetual injunction may be allowed against proceedings at law to recover possession under such sale.[1]

§ 310. A sale of property under a deed of trust will not be enjoined where complainant admits by his bill that a portion of the debt secured by the deed of trust is justly due but makes no tender of such amount. He who would have equity must first do equity, and in the absence of any offer on the part of complainant to pay the amount which he admits to be due he is entitled to no consideration in a court of equity.[2] And where it is sought to restrain a sale of land under a deed of trust on the ground that the deed was executed to secure the payment of a portion of the purchase money of certain personal property purchased by complainant under a false impression as to its character and value, there being no allegations of warranty or of false and fraudulent representations in the original bargain, it is held that an injunction will not lie. The doctrine of *caveat emptor* applies to such a sale, and in the absence of fraud and deceit the purchaser is not entitled to relief in equity.[3]

§ 311. It may be asserted as a general rule that equity will not interfere by injunction to prevent the foreclosure of a mortgage unless it be shown that great and irreparable injury is likely to result, or unless complainant shows himself entitled to more speedy relief than can be had by the slower process of courts of law.[4] And to warrant the exercise of the jurisdiction mere general statements or opinions of complainant as to the injury likely to ensue if the proceedings are left unrestrained will not suffice; facts must be stated and not conclusions or inferences from those facts.[5] Thus, a general allegation in the bill that the foreclosure would materially injure and embarrass complainant in his right is not sufficient to warrant

[1] Pierson v. Ryerson, 1 McCart. 181.

[2] Stringham v. Brown, 7 Iowa, 33; Sloan v. Coolbaugh, 10 Iowa, 81; Casady v. Bosler, 11 Iowa, 242.

[3] Street v. Rider, 14 Iowa, 506.

[4] Montgomery v. McEwen, 9 Minn. 108.

[5] Foster v. Reynolds, 38 Mo. 553; Montgomery v. McEwen, 9 Minn. 108.

the relief.[1] Nor is it sufficient to allege that complainant does not owe the note described in the mortgage, but he must set forth specifically the equities upon which he relies to enjoin the sale.[2] And the fact that the mortgagor has unliquidated demands against the mortgagee which he desires to set off against the indebtedness secured by the mortgage will not warrant an injunction against a sale under a power contained in the mortgage, since the rule is regarded as well settled that unliquidated damages can not be pleaded by way of set-off to proceedings in equity.[3]

§ 312. The fact that judgment has been rendered against the mortgagor as garnishee in another county, does not of itself constitute sufficient equity to warrant him in restraining mortgagees from the collection of the money by a sale of the mortgaged premises under a decree in foreclosure, and in the absence of any allegation that he has satisfied the judgment against him as garnishee he will not be allowed to enjoin proceedings under the decree.[4] And the fact that the mortgagee threatens to sell the premises absolutely and without redemption, does not warrant a court of equity in enjoining a foreclosure of the mortgage by advertisement under the power of sale.[5]

§ 313. The jurisdiction of equity to restrain the commission of waste by the mortgagor in possession, is clearly established from the authorities and is exercised for the purpose of preventing such acts as would depreciate the value of the premises and render the security insufficient. The rights of the mortgagee being in their nature purely equitable and to be enforced by proceedings in equity, it would be falling short of the

[1] Montgomery v. McEwen, 9 Minn. 103. And it is held in this case that the fact that the acts complained of would, if allowed to proceed, result in clouding complainant's title will not authorize an injunction. This doctrine, however, is clearly opposed to the weight of authority. See subdivision IV. of this chapter, Cloud upon title, and cases cited.

[2] Foster v. Reynolds, 38 Mo. 553.

[3] Frieze v. Chapin, 2 R. I. 429. And see Robertson v. Hogaheads, 3 Leigh, 667; Koger v. Kane, 5 Leigh, 606.

[4] Dunham v. Collier, 1 Greene, Iowa, 54.

[5] Armstrong v. Sanford, 7 Minn. 49.

demands of justice if a court of equity could not in a proper case interfere by injunction to protect the property which is the subject of controversy from destruction.[1] It is not necessary that the mortgage should be due to warrant the relief, and the court may, if necessary, interfere before the mortgage is due,[2] or after forfeiture on the part of the mortgagor and after a right of action has accrued.[3] And the fact that the mortgagor has been declared a bankrupt and that his property is vested in the hands of an assignee affords strong foundation for the exercise of the jurisdiction.[4]

§ 314. The interference of equity to prevent the commission of waste by the mortgagor in possession rests upon two grounds: first, the right of the mortgagee to the protection of the entire security unimpaired during the life of the mortgage;[5] and, second, that as between mortgagor and mortgagee the latter is deemed in equity the owner of the fee and as such entitled to protection.[6] But even where the mortgagee is not considered as the owner of the fee he is entitled to the protection of equity against the commission of waste.[7] Thus, where it is held that the mortgage is merely a security for the debt the relief will be allowed to prevent the destruction of the security.[8] But if the injury complained of is such that it may be adequately compensated in damages in an action at law equity will not interpose in the absence of any allegations of insolvency.[9]

§ 315. A junior mortgagee will be allowed to restrain proceedings under a decree of foreclosure whereby it is attempted

[1] Brown *v.* Stewart, 1 Md. Ch. 87; Maryland *v.* Northern etc., 18 Md. 193; Ensign *v.* Colburn, 11 Paige, 503; Gray *v.* Baldwin, 8 Blackf. 164; Bunker *v.* Locke, 15 Wis. 635.

[2] Murdock's Case, 2 Bland, 461; Salmon *v.* Clagett, 3 Bland, 126.

[3] Maryland *v.* Northern etc., 18 Md. 193.

[4] Ensign *v.* Colburn, 11 Paige, 503.

[5] Nelson etc. *v.* Pinegar, 30 Ill. 473.

[6] Id.

[7] Brady *v.* Waldron, 2 Johns. Ch. 148.

[8] Cooper *v.* Davis, 15 Conn. 561; Murdock's Case, 2 Bland, 461; Salmon *v.* Clagett, 3 Bland, 126.

[9] Robinson *v.* Russell, 24 Cal. 467. For further consideration of the subject of waste committed by mortgagees in possession, see Chapter IX.

to tack subsequent advances to the prior mortgage so as to create a lien to the prejudice of the *puisne* incumbrancer.[1] And a mortgagee may be restrained from proceedings at law to sell the equity of redemption in satisfaction of the mortgage debt.[2] But where proceedings are instituted in equity for the foreclosure of a mortgage the mortgagor in possession will not ordinarily be restrained before answer from receiving the rents and profits of the premises.[3]

§ 316. Substantial injury to the rights of the party complaining being an element which must always be made to appear to the satisfaction of a court of equity before it will grant an injunction, a foreign corporation will not be enjoined at the suit of a creditor from mortgaging its property to secure an issue of bonds where it is not shown that the mortgage, if executed, would impair such creditor's rights; and having no lien upon the property which is to be mortgaged, he stands in no better position than other general creditors and is not entitled to an injunction.[4]

§ 317. The fact that the time of sale of lands under a trust deed is unpropitious, that money is scarce and that owing to the terms exacted the sale will be attended with great if not irreparable loss to the owner of the property, affords no ground for enjoining the sale.[5] Nor does the fact that the sheriff has not yet made a report of sale in a proceeding for the foreclosure of a mortgage of itself constitute sufficient ground for enjoining defendant from moving to set aside the sale under the decree of foreclosure.[6]

§ 318. Where the owner of real estate has been induced by fraud and undue influence to give an absolute conveyance of his property to one who has advanced him money, the owner intending only to give a mortgage or security for the money

[1] Hughes *v.* Worley, 1 Bibb, 200.

[2] Severns *v.* Woolston's Ex'rs., 3 Green Ch. 220; Van Mater *v.* Conover, 3 C. E. Green, 38.

[3] Oliver *v.* Decatur, 4 Cranch C. C. 458.

[4] Rogers *v.* Michigan Southern etc., 28 Barb. 539.

[5] Muller *v.* Bayly, 21 Grat. 521; Caperton *v.* Landcraft, 3 West Va. 540.

[6] Rogers *v.* Holyoke, 14 Minn. 220.

advanced, a court of equity will enjoin a sale of the premises by the grantee.[1]

§ 319. A subsequent incumbrancer or mortgagee can not restrain a sale of the premises under a prior incumbrance where he refuses to redeem under such prior incumbrance and only seeks to hinder the sale, especially where the property is depreciating in value by lapse of time.[2]

§ 320. Where through a mistake in the description a mortgage does not cover the entire premises intended to be conveyed, there is sufficient ground for invoking the protection of equity, and a purchaser at a foreclosure sale under the mortgage may enjoin the devisee of the mortgagor from proceeding in ejectment to recover that portion of the premises which was omitted.[3] So a sheriff may be enjoined from delivering a deed of premises sold by him by virtue of an execution in foreclosure proceedings when the execution by mistake has directed the sale of lands not included in the mortgage nor described in the bill.[4] And where in construing a mortgage there is serious question as to whether certain machinery on the premises is included in it, a plain case is afforded for the interposition of equity to prevent the removal of the property, it being proper that the court should retain it within its jurisdiction until the question can be satisfactorily determined.[5]

§ 321. A mortgagor who has paid the mortgage in full and afterward conveys the property with covenants of warranty, may properly invoke the aid of equity to restrain proceedings by the mortgagee to foreclose the mortgage which has been satisfied, and he will not be compelled to wait until suit by his grantee on the covenants of warranty.[6] And a mortgagee who has sold property mortgaged to him as security for a note may be restrained from proceedings upon

[1] Peeler v. Barringer, Winston's Law and Eq., part second, 5.
[2] Meysenburg v. Schlieper, 46 Mo. 209.
[3] Waldron v. Letson, 2 McCart. 126.
[4] Corles v. Lashley, 2 McCart. 116.
[5] Hutchinson v. Johnson, 3 Halst. Ch. 40.
[6] Hubbard v. Jasinski, 46 Ill. 160.

his judgment until an account can be had.[1] But a judgment creditor will not be enjoined from satisfying his judgment out of the railway property of his debtor on which a mortgage is given simply because possession of the property by the railway is necessary for the payment of the mortgage.[2]

§ 322. As regards the question of crops growing on the premises at the time of a sale under foreclosure it is held that the doctrine of emblements does not apply and that such crops properly belong to the purchasers at the foreclosure sale. Equity will therefore restrain the creditors of the mortgagor from proceeding under an execution to levy upon such crops.[3]

§ 323. Upon principles analogous to those which govern a court of equity in restraining the commission of waste by a mortgagor in possession in cases of real estate, a mortgagor of chattels may be restrained from removing the property beyond the reach of the mortgagee or from placing it where it will not be forthcoming for the satisfaction of the debt.[4] And a mortgagee of personal property, where by the terms of the mortgage possession is to be retained until condition broken, may enjoin proceedings against the property by other creditors.[5] While the principle is not disputed that the equity of redemption of a mortgagor of personal chattels in possession may be levied upon and sold in satisfaction of an execution against the mortgagor, yet a court of equity may by injunction restrain the exercise of this right where it will greatly impair if not largely destroy the rights of the mortgagee to the property in question.[6]

[1] Craft v. Bullard, Sm. & M. Ch. 366.
[2] Coe v. Knox etc., 10 Ohio St. 412.
[3] Crews v. Pendleton, 1 Leigh, 297.
[4] Clagett v. Salmon, 5 Gill & J. 314.
[5] Curd v. Wunder, 5 Ohio St. 92.
[6] Smithurst v. Edmunds, 1 McCart. 408.

VII. EJECTMENT.

§ 324. Questions of title properly determinable at law.
325. Equity will not interfere where defense can be established at law.
326. Estoppel *in pais*.
327. Cloud upon title.
328. Mistake of fact a ground for relief.
329. Multiplicity of suits.
330. Contract by infant.
331. Incapacity to sue.
332. Bill to redeem.
333. Parties.

§ 324. Though injunctions are sometimes granted to stay proceedings in ejectment to try the title to real property, the jurisdiction is by no means a favorite one with courts of equity, and the usual course in the absence of fraud or some special circumstances demanding the relief is to leave all questions of title to be determined by courts of law. And it may be asserted generally that equity will not in the course of judicial proceedings restrain a person from asserting title to real estate unless in a case entirely free from doubt. Where, therefore, the title is being tested by an action of ejectment in a common law court having jurisdiction of the subject matter, a court of equity will rarely interfere or enjoin the proceedings.[1] An injunction under such circumstances would be repugnant to the well-established principle that where there is concurrent jurisdiction over the same subject matter in different tribunals, the right of determining the controversy attaches to that tribunal to which resort is first had.[2]

§ 325. In conformity with the principles laid down in the preceding section, proceedings in ejectment will not be enjoined where the questions of title involved can be properly determined at law, or where the ground relied upon for an injunction would be equally available if urged as a defense to

[1] Stockton *v.* Williams, 1 Doug. Mich. 546.
[2] Id.

the action of ejectment.[1] Thus, where a preliminary injunction has been granted against proceedings in ejectment, it will be dissolved as to that part of the property in controversy, the title to which can be properly determined in the proceedings at law.[2] Nor will an injunction be retained restraining an action of ejectment where it is perfectly clear and apparent that complainants have a good defense to the action at law. and that the deed on which plaintiff in ejectment relies is utterly void, but the parties will be left to the decision of a court of law.[3]

§ 326. Where plaintiff in ejectment is in equity and conscience estopped from any claim to recover the premises, as where his conduct has been such as to warrant defendant in going on with the erection of works and the expenditure of large amounts of money, the action may properly be enjoined.[4] And where one has encouraged the making of expenditures upon land to such an extent that the parties can be reimbursed only by the enjoyment of the land itself, he may be enjoined from prosecuting an action of ejectment to recover possession of the premises.[5] So in conformity with the doctrine of implied trusts, ejectment against a corporation may be restrained where plaintiff in the action has acted for the corporation, and where, though taking the title in his own name, he is considered in equity as a trustee for the company.[6]

§ 327. Actions of ejectment may sometimes be enjoined in equity where the relief is necessary for the purpose of preventing a cloud upon title. Thus, the owner in fee of real property may restrain the prosecution of an action of ejectment by a claimant under a sheriff's deed which vests an apparently good title in the grantee, on the ground that the

[1] Camden etc. *v.* Stewart, 3 C. E. Green, 489; Morris etc. *v.* Jersey City, 1 Beas. 227.

[2] Camden etc. *v.* Stewart, 3 C. E. Green, 489.

[3] Morris etc. *v.* Jersey City, 1 Beas. 227.

[4] Trenton etc. *v.* McKelway, 4 Halst. Ch. 84.

[5] Big Mountain etc., Appeal, 54 Pa. St. 361.

[6] Id.

sheriff's deed constitutes a cloud upon the title.[1] Where, however, as between the parties to the action the equities are equal, an injunction will be withheld. Thus, equity will not on behalf of a purchaser of real estate who has given his bond for the purchase money, enjoin an action of ejectment brought by an innocent purchaser in good faith and without knowledge of complainant's rights. In such case the equities being equal the parties will be left to their remedy at law.[2]

§ 328. A mistake of fact may sometimes constitute sufficient ground for restraining proceedings in ejectment. And where on a sale of lands under execution against judgment debtors in possession, the sheriff's deed by mistake omitted a portion of the land, an injunction has been allowed to restrain the judgment debtors from an action of ejectment to recover the premises from an innocent purchaser, who had acted in good faith and under the impression that he was buying the whole.[3] But a mortgagee who has recovered judgment in ejectment for the mortgaged premises, will not before hearing be restrained from proceeding with the enforcement of his judgment.[4]

§ 329. The prevention of a multiplicity of suits is a favorite ground for the jurisdiction of equity in restraint of proceedings at law, and will avail as well in restraining actions of ejectment as those of any other nature. Thus, where one is in full possession of land with complete legal title, though not all appearing of record, he may enjoin a number of ejectment suits brought against him as to a portion of the premises, since the question is the same as to all and may be determined by a single suit in chancery, thus avoiding a multiplicity of actions.[5] But a distinction is to be observed between bills for the prevention of multiplicity of suits, or bills of peace, whose object is the suppression of useless and vexatious litigation, and cases where the real object of the relief sought is the con-

[1] Sieman v. Austin, 33 Barb. 9.
[2] McFarlane v. Griffith, 4 Wash. C. C. 585.
[3] DeRiemer v. Cantillon, 4 Johns. Ch. 85.
[4] Todd v. Pratt, 1 Har. & J. 465.
[5] Woods v. Monroe, 17 Mich. 238.

solidation of a number of suits of like nature, since in the former class of cases courts of equity may properly enjoin, but in the latter they will refuse to interfere. Thus, where an injunction was asked to stay proceedings in ninety-two actions of ejectment, until one or more might be tried, the parties, pleadings, title and testimony being the same in all the cases, the relief was refused, the real object sought being a consolidation of the actions which a court of law might properly grant.[1]

§ 330. An injunction will not be allowed against proceedings in ejectment brought by the owner of land after attaining majority, who while an infant had contracted for the sale of the land and given a bond for the conveyance, but had repudiated the contract on coming of age and refused to ratify the sale, even though the purchase money had been paid.[2]

§ 331. The fact that an action of ejectment is barred by the statute of limitations, will not of itself suffice to warrant an injunction against the proceedings, where the parties in interest have been incapacitated from bringing suit. Thus, ejectment by an administrator to recover land for the benefit of the heirs of a decedent, will not be enjoined on the ground that the statute of limitations has run, where neither of the heirs has been in a condition to sue, one of them being *non compos* and the other a *feme covert*.[3]

§ 332. Where a preliminary injunction has been granted to restrain the prosecution of an action of ejectment, upon the ground that the transaction out of which plaintiff in ejectment claims to derive title was in reality a mortgage, from which defendant seeks to redeem, and files a bill for that purpose, and to enjoin the proceedings at law, the injunction should be made perpetual on the right of redemption being established, and it is error if the court does not so direct.[4]

§ 333. As regards the parties who may properly enjoin

[1] Peters v. Prevost, 1 Paine C. C. 64. Whether in such case the injunction would be allowed against the remaining suits after verdict obtained in several, *quære*.

[2] Brawner v. Franklin, 4 Gill, 463.

[3] Fleming v. Collins, 27 Geo. 494.

[4] Harbison v. Houghton, 41 Ill. 522.

proceedings in ejectment, it may be observed that the right to the relief is not confined to those who were originally joined as defendants in the action, but it may be extended to others who are subsequently joined as defendants. And a defendant in ejectment is not deprived of his right to relief against the judgment because of his having come into the ejectment suit after it was begun, by purchasing the interest of the tenant and joining with him in the defense.[1]

VIII. Special Cases.

§ 334. Landlord and tenant.
335. Effect of judgment lien.
336. Estovers.
337. Growing crops.
338. Devisees.
339. Writ of restitution will not be enjoined.
340. Purchaser must accept title when tendered.
341. Special cases.
342. Fruit and ornamental trees.
343. Tenants in common; advancement to heir.
344. Tenants on shares.
345. Sale of wife's property for husband's debts.
346. Trust property.
347. Courts of equity may restrain their own officers.
348. Defects and irregularities in proceedings of municipal tribunals no ground for relief.
349. Delay in making conveyance.
350. Municipal corporations.
351. Government will not be enjoined from removing its temporary structures.
352. Legislative control over soil supreme to prevent injurious use.

§ 334. The jurisdiction of equity by injunction is sometimes invoked for the protection of the rights of tenants. While, however, it is held that equity has jurisdiction at the suit of a tenant to prevent the landlord from breaking a covenant which, though not made with the tenant, will, if

[1] Hackwith v. Damron, 1 Monr. 285.

broken, work a forfeiture of the lease, yet where a plain construction of the covenant does not warrant the interpretation put upon it by complainant the relief will not be granted.[1] Nor will proceedings by a lessor to recover possession of his property demised under a lease from year to year, be enjoined on the ground that the lessee has made valuable improvements which will be lost to him in case of his dispossession.[2]

§ 335. The effect of a judgment lien on real estate is frequently decisive in determining whether an injunction shall be allowed. Thus, a subsequent *bona fide* purchaser may enjoin a sale of realty under a judgment, when the lien created by statute in favor of the judgment creditor has expired by lapse of time without a sale being had.[3] And where judgment creditors have stipulated in writing that they will not enforce their lien against certain real estate of the defendant, it has been held that subsequent attempts to enforce the lien against the property in violation of the agreement might be enjoined.[4] But one who holds a prior lien on real estate will not be allowed to enjoin a subsequent judgment creditor from enforcing his judgment by execution, since a sale under such execution would not impair or defeat the prior lien, but would leave it at law and in equity as if such sale had never taken place.[5]

§ 336. Pending a trial at law to determine the right to estovers, an injunction may be allowed to prevent their use until the right shall be adjusted, the relief being extended in such case upon principles analogous to those governing in cases of waste. Thus, where one claims the right to estovers in the real estate of another, but the question has been decided against him in one action at law, and another action is still pending to determine the right, he may be enjoined from taking estovers. The jurisdiction under such circumstances rests on the necessity of avoiding a multiplicity of suits, and of

[1] Rogers *v.* Danforth, 1 Stockt. 289.
[2] West *v.* Flannagan, 4 Md. 36.
[3] Riggin *v.* Mulligan, 4 Gilm. 50.
[4] Reily *v.* Miami etc., 5 Ohio, 333.
[5] Union Bank etc. *v.* Poultney, 8 Gill & J. 324.

preventing further depredations upon the estate until the right can be fully determined at law.[1]

§ 337. Where a tenant from year to year, on the expiration of his lease proceeds, contrary to the custom of the country, to remove hay, straw, fodder and other articles the produce of the land, a decree in equity having already appointed a receiver of the rents and profits of the estate, a peremptory injunction may be issued to restrain such removal by the tenant, although he was not a party to the proceedings in equity and no bill has been filed against him.[2] But a lessee will not be restrained from removing crops out of which he is by the terms of his contract to pay the rent in kind, there being no averments that the lessee is insolvent, or that he is without other property out of which an execution might be satisfied.[3] Nor will one who has merely a naked right to the possession of real estate, without any legal interest therein, as an administrator, be allowed to enjoin the party in possession of the premises from disposing of the crops which he has raised thereon, the beneficial interest being wholly in him against whom the restraining power of the court is sought to be exercised.[4]

§ 338. As between judgment creditors and devisees of a specific portion of the estate of a deceased debtor, equity will not usually interfere in behalf of the devisees. Thus, where a creditor has obtained a decree authorizing specifically a levy upon the estate that belonged to the debtor at the time of his death, in whosesoever hands the same may be, he will not be enjoined at the suit of specific legatees or devisees, from levying upon that portion of the estate devised to them, on the ground that the testator had set apart a particular portion of his estate for the payment of his debts. In such a case the legatees are regarded in equity merely as volunteers, whose rights are subordinate to those of the judgment creditors.[5]

[1] Livingston v. Livingston, 6 Johns. Ch. 497, and cases cited.
[2] Walton v. Johnson, 15 Sim. 352.
[3] Gregory v. Hay, 3 Cal. 332.
[4] Converse v. Ketchum, 18 Wis. 202.
[5] Maxwell v. Maxwell, Charlt. R. M. 462.

Nor will one of several joint devisees of land be restrained from entering thereon and taking possession of a portion of the estate devised to them separately, where the injunction is asked by a tenant claiming under the other devisees.[1]

§ 339. Questions growing out of litigation concerning title to real property, and which are properly determinable in a legal forum, will not be recognized as the foundation for relief in equity against the proceedings. And where, under a conviction of forcible entry and detainer, a writ of restitution is awarded the successful party, equity will not enjoin proceedings for the enforcement of the writ upon the ground that complainant in the injunction suit is the rightful owner of the land under an elder title.[2] Nor will a writ of restitution be enjoined where no grounds of irreparable injury are shown, and where the real purpose of the bill is to quiet complainant's possession and to suppress future litigation concerning the property.[3]

§ 340. A court of equity may properly compel the purchaser of land to accept a good title tendered by the personal representatives of his grantor, who had sold with covenants of warranty, notwithstanding the purchaser has obtained judgment for the breach of covenants contained in his grantor's

[1] Baldwin *v.* Darst, 3 Grat. 132.

[2] Hamilton *v.* Hendrix's Heirs, 1 Bibb, 67.

[3] Tevis *v.* Ellis, 25 Cal. 515. Shafter, J., delivering the opinion of the court, says: "The principal purpose of this action is to obtain a decree quieting the possession of the plaintiff and suppressing future litigation at law by perpetual injunction. If it appeared by the complaint and affidavit that the defendants were doing or were threatening to do, or were procuring to be done, or were suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, or tending to the great and irreparable injury of the plaintiff, an injunction might go, staying the act in view of its consequences. But the complaint does not present a case of that impression. It charges, as a ground for the injunction, that the defendants intend to disseize the plaintiff of his lands—that and no more; and asks that they may be restrained from carrying their purpose into execution. Should the defendants succeed in their design, the remedies at law would be speedy, adequate and complete. The order dissolving the injunction is affirmed."

deed; and under such circumstances the court will award an injunction against the enforcement of the judgment.[1]

§ 341. An entry upon land under rights reserved to the grantor by the contract of sale will not of itself warrant the interference of equity. Thus, a vendor who has merely given a bond for conveyance with a provision that he may re-enter in case of default in payment of the purchase money, will not be enjoined from re-entering if the purchaser be in default.[2] But the relief has been allowed against a stipulation in the nature of a penalty in the bond or deed of trust. Thus, where it was provided that in case of default of the debtor to pay the annual interest the principal should be deemed due and payable, the provision being construed in the nature of a penalty, relief has been allowed against its enforcement.[3] But the fact that the notes to secure which a deed of trust is given are in suit and their validity is questioned, affords no ground for enjoining a sale under the deed of trust.[4]

§ 342. An injunction is the proper remedy on behalf of a vendee in possession to restrain the vendor from the removal of fruit trees and ornamental shrubbery, notwithstanding vendor claims the right to such removal under a verbal reservation. Such improvements are considered as passing with the realty and the right of the purchaser will be protected in equity.[5] It is, however, incumbent upon complainant to set forth clearly the facts and circumstances on which he relies for relief, and to warrant an injunction against proceedings at law on the ground of confusion of boundaries, complainant must allege the fact of such confusion and the circumstances producing it.[6]

§ 343. Relief by injunction will sometimes be allowed between tenants in common for the purpose of preserving the estate and preventing serious injury. Thus, a judgment at

[1] Reese *v* Smith, 12 Mo. 344.
[2] Boyd *v.* Lofton, 34 Geo. 494.
[3] Mayo *v.* Judah, 5 Munf. 495.
[4] Gibson's Heirs *v.* Niblett, Sm. & M. Ch. 278.
[5] Smith *v.* Price, 39 Ill. 28.
[6] Foster, *ex parte*, 11 Ark. 304.

law for the partition of real estate at the suit of some of the tenants in common, may be enjoined by the other tenants upon an allegation that the partition can not be made without serious injury to the owners. And under such circumstances the injunction should be continued to the hearing, that the court may upon the proofs decide whether the partition would be for the interest of the parties.[1] So where one of the heirs of an intestate had received an advancement during the lifetime of his father in full of his share of the estate, a sale of the intestate's land under a judgment against the heirs may be enjoined.[2]

§ 344. Tenants of real estate on shares, who by their bad management have caused great loss to the owner, and who are insolvent, may be restrained from removing their share of the crops from the premises until the damages sustained by the owner can be ascertained, the insolvency of the defendants rendering the remedy at law less efficacious than that in equity.[3]

§ 345. A sale of a wife's property to satisfy a debt of her husband affords good ground for the interference of equity, and where the judgment creditors of the husband purchase a mortgage upon the wife's land, and issue execution thereon for the purpose of securing their judgments against the husband, they may be enjoined from proceeding until they shall execute an assignment of the mortgage to the wife, upon her payment of the mortgage debt, with interest and costs.[4] Where, however, the case is simply one of a conflict of interest, the wife's title being disputed and the creditor having a right to proceed against the property to test her title, it is error for a court of equity to assume jurisdiction, and by restraining the execution thus withdraw the questions in dispute from a trial by jury.[5]

§ 346. Where a judgment creditor is attempting to enforce

[1] Gash v. Ledbetter, 6 Ired. Eq. 183.
[2] Dyer v. Armstrong, 5 Ind. 437.
[3] Lewis v. Christian, 40 Ga. 187.
[4] Lyon's Appeal, 61 Pa. St. 15.
[5] Winch's Appeal, 61 Pa. St. 424.

his judgment by sale of real estate conveyed by the debtor in trust before the debt on which the judgment is rendered was incurred, an injunction may be allowed to restrain the sale until the question of whether the trust was created in fraud of creditors can be determined.[1] And where the creditor may collect his judgment out of property that his debtor has not conveyed, but refuses or fails to do so, he may be enjoined from proceeding against the grantee of his debtor.[2]

§ 347. Courts of chancery have power to restrain the proceedings of their own officers, if necessary, and a special commissioner in chancery appointed to sell lands under a decree may be enjoined in a proper case, he occupying the same position that a sheriff would under like circumstances.[3] But in enjoining proceedings under a decree for the sale of realty, the court will not inquire into the rights of parties existing antecedent to the rendering of the decree and which might have been inquired into at that time.[4]

§ 348. Mere irregularities in the proceedings of municipal tribunals in the sale of lands for taxes, or in the opening of streets for the public benefit, will not warrant equity in interfering to restrain such proceedings, since a court of equity will not sit as a court of errors to review the action of other tribunals.[5] Thus, alleged irregularities in a sale of lots for taxes afford no ground for the interference of equity to restrain the purchaser from afterward selling the same lots, the two sales being entirely independent of and distinct from each other.[6] Nor will a court of equity interfere to restrain the enforcement of judgments rendered against complainant for the benefit to his property by the opening of certain streets, on the ground of defects and irregularities in the proceedings, the proper remedy for such grievances being by *certiorari*.[7]

[1] McCann v. Taylor, 10 Md. 418.
[2] Hurd etc. v. Eaton, 28 Ill. 122.
[3] People etc. v. Gilmer, 5 Gilm. 242.
[4] Id.
[5] St. Louis v. Goode, 21 Mo. 216; Ewing v. St. Louis, 5 Wal. 413.
[6] St. Louis v. Goode, 21 Mo. 216.
[7] Ewing v. St. Louis, 5 Wal. 413.

§ 349. Where a purchaser in compliance with the contract of sale has actually paid the purchase price, but the vendor has delayed for three years to give title, the vendor will not be allowed to enjoin proceedings at law to recover back the amount paid, without showing some equitable excuse for his delay in giving a deed.[1]

§ 350. A municipal corporation may be restrained from encroaching upon the property of private citizens, although such encroachments are made under pretense of preventing the obstruction of public streets.[2] The jurisdiction is exercised in such cases on the ground of quieting title, and where complainant has been for twenty years in continued and adverse possession of public ground or of a public street, he is entitled to the aid of equity to prevent the municipal authorities from interfering.[3]

§ 351. Officers of the government will not be restrained from removing temporary buildings erected as barracks and a military hospital, the buildings not being incorporated into the soil, and there being no assertion of title on the part of the government, or of an intention to retain adverse possession of the realty.[4]

§ 352. Where land has been conveyed to a religious congregation which uses it for burial purposes, and commissioners are afterward appointed by act of legislature to sell the ground and remove the bodies interred to other ground purchased with the proceeds of the sale, lot owners in the original burial ground will not be allowed to enjoin the disinterment of the bodies, the legislature having the paramount right to the control of the property in such manner that it shall not be injurious to others.[5]

[1] Anderson v. Frye, 18 Ill. 94.
[2] Dudley v. Trustees etc., 12 B. Mon. 610.
[3] Id.
[4] Meigs' Appeal, 62 Pa. St. 28.
[5] Kincaid's Appeal, 66 Pa. St. 411.

CHAPTER VII.

OF INJUNCTIONS AGAINST TAXES.

I General Outlines of the Relief.
II. Cloud upon Title.
III. Taxes imposed by Municipal Corporations.
IV. Bounties.
V. Special Cases.

I. General Outlines of the Relief.

§ 353. Conflicting decisions.
354. Mere illegality of tax not sufficient ground for injunction; exceptions to the rule.
355. Irregularities or errors in assessment will not warrant an injunction.
356. Technical errors no ground for relief.
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362. Injury must be irreparable.
363. Valid portion of tax must be paid.
364. Estoppel *in pais*.
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366. Distinction as to personal and real property.

§ 353. No branch of the law of injunctions has given rise to more conflicting and irreconcilable decisions than that pertaining to the relief against the assessment and collection of taxes. Acting upon the principle that a tax illegally or improperly imposed confers no authority upon the officer who attempts its enforcement, but renders him a mere trespasser, liable in an action at law for the damages committed, courts

of equity have in many instances been inclined to deny the relief in this class of cases, except upon some special grounds which will be examined hereafter, and to leave the parties aggrieved to their remedy at law. And while the general current of authority is opposed to the exercise of the jurisdiction, save in extreme cases, the decisions are neither few in number nor wanting in respectability which hold a contrary doctrine and justify the interference to restrain taxes upon grounds unwarranted by the weight of authority.

§ 354. It may be laid down as a general rule that equity will not interfere to restrain a tax which is illegal or void merely because of its illegality, but there must be some special circumstances attending the injury threatened to distinguish it from a mere trespass and thus bring the case within some recognized head of equity jurisprudence; otherwise the person aggrieved will be left to his remedy at law.[1] An exception

[1] Dows *v.* Chicago, 11 Wal. 108; Heywood *v.* Buffalo, 14 N. Y. 534, Mutual etc. *v.* Supervisors etc., 33 Barb. 322; Burnes *v.* Mayor etc., 2 Kan. 454; Sayre *v.* Tompkins, 23 Mo. 443; Barrow *v.* Davis, 46 Mo. 394; McPike *v.* Pew, 48 Mo. 525; Warden *v.* Supervisors etc., 14 Wis. 618; Kellogg *v.* Oshkosh, Ib. 623. But see, *contra*, Williams *v.* Peinny, 25 Iowa, 436, Jeffersonville *v.* Patterson, 32 Ind. 140; Wood *v.* Draper, 24 Barb. 187, where it is held that a tax contrary to law, or levied without authority of law, may be enjoined, though in the latter case the relief was denied because complainant had not averred in his bill that it was filed on behalf of all others similarly situated, the court holding that such an averment was necessary to a complete determination of the rights of the parties. In Heywood *v.* Buffalo, 14 N. Y. 534, it is held that three exceptions exist to the rule as stated in the text: first, where the proceedings will necessarily lead to a multiplicity of suits; second, where they lead in their execution to the commission of irreparable injury to the freehold; third, where the claim of the adverse party to the land sold for the unpaid taxes is valid upon the face of the instrument, or the proceedings sought to be set aside are valid upon their face and extrinsic facts are necessary to be proved in order to establish the invalidity or illegality. "Whenever," say the court, "a case is made by the pleadings falling within these exceptions, or either of them, equity will interpose to arrest the excessive litigation, or prevent the irreparable injury, or remove the cloud from the title." However clear and satisfactory this statement of the exceptions to the rule may appear, it will be found as we proceed that it does not comprehend all the recognized exceptions, and a serious conflict of authority may be observed running through all the cases.

to the rule has been allowed in cases where the proceedings, though illegal and void, were under legal color and apparently authorized by law.[1] So where there is an entire absence of authority for the assessment of the tax, or for proceedings thereunder, the relief has been granted. Thus, a sheriff whose term of office has expired has been enjoined from selling property in satisfaction of the tax, which he might rightfully have done during his term.[2] And a tax levied without authority by a corporation, or by persons acting as such, may be enjoined.[3] Though the collection of a tax has been restrained on the ground of its unconstitutionality, where there was no adequate remedy at law and the injury was irremediable and threatened the destruction of complainant's franchise,[4] yet in general the unconstitutionality of the act will not warrant the interference by injunction.[5] But where the officers levying the tax were

[1] Burnet v. Cincinnati, 8 Ohio, 73; Culbertson v. Same, 16 Ohio, 574; Jonas v. Same, 18 Ohio, 318. Even this exception has been denied by the same court in McCoy v. Chilicothe, 8 Ohio, 370.

[2] Fremont v. Boling, 11 Cal. 380.

[3] Beverly v. Sabin, 20 Ill. 357; Ottawa v. Walker, 21 Ill. 610. It is difficult, however, to perceive any sufficient reason why the relief should be granted in such cases, since the persons thus assuming to enforce the tax without authority are trespassers and are liable at law for the damages incurred.

[4] Foote v. Linck, 5 McLean, 616.

[5] Mechanics etc. v. Debolt, 1 Ohio St. 591; Exchange etc. v. Hines, 3 Ohio St. 1. In this case, Bartley, C. J., delivering the opinion of the court, says: "The bill seeks relief against an alleged threatened trespass, and avers the defendant's pecuniary inability to respond in adequate damages. If the law under which the defendant is about to proceed be wholly unconstitutional and void, as is alleged in the bill, the defendant would be liable to damages in an action at law, to the extent of the injury which might be done to the complainant by the threatened wrong. Equitable relief by injunction against a tort rests wholly upon the inadequacy of the remedy at law. It is well settled that a court of chancery will not interfere by injunction to prevent a simple trespass, susceptible of compensation in damages in a proceeding at law, whether about to be committed in the pretended collection of a tax, or otherwise; and to authorize the interference of this extraordinary power there must be a case of apparent imminent danger of great and irreparable damage, for which an action at law would not furnish full indemnity. Mechanics etc. Bank v. Debolt, 1 Ohio St. 591." But see Knowlton v. Supervisors etc.,

improperly elected and their action is therefore void,[1] or where the tax was levied by less than the requisite majority of a board of supervisors, an injunction may be allowed.[2]

§ 355. Equity will not interfere by injunction to restrain the enforcement of tax proceedings on the ground of irregularities or errors in the assessment of the tax, or in the execution of the power conferred upon taxing officers, the remedy at law being deemed sufficient in such cases.[3] And where it does

9 Wis. 410, where proceedings under a tax were enjoined on the ground that they were in violation of a constitutional provision requiring that the rule of taxation should be uniform.

[1] Kinyon v. Duchene, 21 Mich. 498.

[2] Supervisors v. Webster, 53 Ill. 141.

[3] Clinton etc., Appeal, 56 Pa. St. 315; O'Neal v. Virginia etc., 18 Md. 1; Livingston v. Hollenbeck, 4 Barb. 9; Macklot v. Davenport, 17 Iowa, 379; Center etc. Co. v. Black, 32 Ind. 468; Warden v. Supervisors etc., 14 Wis 618; Kellogg v. Oshkosh, Ib. 623; Exchange etc. v. Hines, 3 Ohio St. 1; Jackson v. Detroit, 10 Mich. 248; Williams v. Mayor etc., 2 Mich. 560; Greene v. Mumford, 5 R. I. 472; Schofield v. Watkins, 22 Ill. 66; Chicago etc. v. Frary, Ib. 34; Merritt v. Farris, Ib. 303; Munson v. Minor, Ib. 594; Metz v. Anderson, 23 Ill. 463. The grounds upon which the relief is refused in cases of irregularity in the proceedings are very clearly stated by Caton, C. J., in Chicago etc. v. Frary, 22 Ill. 34, as follows: "We have in this case been called on to inquire in what cases the powers of a court of chancery may be exercised to restrain the collection of the revenue of the state. The decisions of this court show, that in a large majority of the cases involving the regularity of the proceedings for the collection of the revenue, we have met with irregularities in the proceedings to such an extent as to destroy the titles to real estate acquired at tax sales. In this way, has a court of common law afforded a remedy for irregularities in the execution of the revenue laws. The same and even additional redress is afforded to parties whose personal property is seized for a tax illegally assessed. If in all these cases the court of chancery had taken the matter in hand, and examined the regularity of the proceedings whenever an attempt was made to collect the revenue, and restrained its collection, if it were shown that the law had not been complied with in the assessment of the taxes, the result would have been that in many if not most cases the collection of the revenue would have been enjoined, and taxes would not have been collected. Under such a system of the administration of the laws, with so complicated a revenue system as ours, rendered so by a tender regard for the rights and interests of the citizen, no government could exist for a single year. Let us now, by sustaining this bill, stretch out the strong arm of this court and stay the hand of the collector in every case where any irregularity can be shown in the assessment of the revenue, and

not appear that the established principle of taxation has been violated, or that actual and substantial injustice will result from the operation of the tax, or that it was for an unauthor-

a flood of injunctions would be spread over the land at once. State and county revenue would cease to be collected, at least till the termination of protracted litigation, and the wheels of government would stop. It is no answer to say, let those whose duty it is to administer the revenue law do it with greater care, and do everything which the law requires, just as it requires, and at the time specified, and be careful that they do no more than is required. We must take things as they are and look at practical results. Neither precedents nor reason will warrant the use of the writ of injunction for such purposes, and to produce such results. Where the law affords an adequate remedy this writ cannot be used, and especially where greater mischief will flow than good will result from it, the court will always withhold this species of relief. Equity cannot attempt to prevent, any more than it will redress all wrongs. It is not in ordinary but in extraordinary cases that this writ is properly invoked. If the law can redress the wrong—if it can repair the injury, equity must suffer it, and let the courts of law redress it. This is the general rule to which there are no doubt exceptions, and exceptions too in cases of the collection of taxes. Those exceptions are confined almost, if not entirely, to cases where the tax itself is not authorized by law, or if the tax itself is authorized, it is assessed upon property which is not subject to the tax. Such was the case of the Illinois Central Railroad Company *v.* the County of McLean, 17 Ill. R. 291. There we enjoined a tax levied upon property not subject to that tax. But it is unnecessary to refer to all the cases to be met with in our own and other reports on this subject. Where an injunction has been finally sustained it will generally, if not always, be found to be of this class. It is possible that cases may sometimes be found where this distinction has been disregarded from inadvertence, or from the peculiar circumstances connected with them. We can find no other basis for a reasonable and practical distinction. If we permit the injunction to be issued where the tax is authorized by law and the thing taxed is liable to that tax, there is no stopping point short of enjoining all taxes, whenever any irregularity has intervened. This power the court of chancery has never assumed, nor could it without the most disastrous consequences to the state. There may be cases, the particular circumstances, or peculiar hardships of which will justify an exception to this general rule. This is not one. We have examined the alleged irregularities in the levy of this tax, and are by no means prepared to say that they can be sustained anywhere. Indeed we think a satisfactory answer to all these objections possible, but we choose to place our decision upon the broad ground of jurisdiction, that all may distinctly know when the court of chancery will, and when it will not interfere to enjoin the collection of the public revenue, or at least that they may know what the general rule on this subject is."

ized purpose, equity will not restrain the execution of a deed of land sold for taxes on the ground that the proceedings were irregular, or even void in some particulars.[1] Thus, an error consisting in a misnomer of the defendant corporation on the assessment books will not authorize the relief.[2] Nor will the fact that property subject to taxation has not been listed warrant the interference.[3]

§ 356. In case of mere non-compliance with some particular direction of the statute, aside from which the tax is sufficiently regular, or where the irregularities relate only to the time in which the different steps were taken, and do not

[1] Warden *v.* Supervisors etc., 14 Wis. 618; Kellogg *v.* Oshkosh, Ib. 623. Warden *v.* Supervisors etc., was a proceeding in equity to enjoin the execution of a deed of certain lands sold for taxes upon the ground of irregularities in the assessment. The chief point relied upon was the fact that the taxes for a certain year, not being paid, were carried over and included in the tax roll and treasurer's warrant for the succeeding year. Dixon, C. J., in giving the opinion of the court, says: "The collection of a tax, under the statute, is a legal proceeding to enforce the payment of a debt due the public, and, like proceedings at law upon a private claim, equity will only interfere to prevent injustice by the unfair use of the process of the law. The primary and controlling principle in such cases is, that the proceedings to be stayed are inequitable and unjust, and that it will be against conscience to allow them to go on. Stokes *v.* Knarr, 11 Wis. 389; Ableman *v.* Roth, 12 Wis. 91. It will not be enough to show that they are irregular or even void. Courts of equity do not sit to reverse or correct errors and mistakes of law. To be entitled to their assistance the party applying must show that he is in danger of unjustly losing a substantial right, and that he is in no fault. Neither of these things appears in this case." And accordingly the action was dismissed. But see, *contra*, Myrick *v.* La Crosse, 17 Wis. 442, where it is held that if the defect in the proceedings is not simply one of form, or a technical error, but is a material defect, depriving complainant of a substantial and valuable right secured to him by law, the assessment is invalid and the injunction will be allowed to restrain proceedings thereunder. And in Siegel *v.* Supervisors, 26 Wis. 70, it is held that the issuing of a tax deed for lands sold under a tax adjudged to be void may be enjoined by one whose title, though acquired after the assessment, will yet be clouded by such deed.

[2] O'Neal *v.* Virginia etc., 18 Md. 1.

[3] Exchange etc. *v.* Hines, 3 Ohio St. 1. In Indiana a distinction is taken between the case of a defect in the law itself and irregularities in its execution, and while in the former case the relief will be allowed, in the latter it will be withheld. Center etc. Co. *v.* Black, 32 Ind. 468.

affect the principle of taxation or the groundwork of the proceedings, relief in equity will not be allowed, such irregularities being regarded as merely technical defects, which, while they can never be wholly avoided, do not go to the merits of the proceedings.[1] Nor will alleged irregularities in the sale of lands for taxes afford ground for the interference of equity to restrain the purchaser from afterward selling the same lands, the two sales being entirely independent of and distinct from each other.[2]

§ 357. An exception to the rule of non-interference has been recognized where an act of legislature, held by the court to be constitutional, exempted certain property from taxation, and an injunction has been allowed against the enforcement of a tax upon such property.[3] And an injunction has been granted against the assessment of the property of a corporation where, under the terms of its charter as construed by the court of last resort in the state, the property was exempt from taxation.[4]

§ 358. But an act of legislature whose terms authorize a transfer or sale of the taxing power of the state with reference to certain corporations, releasing them on certain conditions from further taxation, being held unconstitutional, its enforcement may be enjoined.[5] And in such case any tax payer or loan creditor of the state has such an interest in the matter as to make him a proper party to the bill.[6] But, although a statute exempting railway corporations from their due proportion of taxation be unconstitutional, the omission in pursuance of the statute to tax the property of such railways in the same ratio that individual citizens are taxed, will not render void a tax levied upon the property of others subject to taxation. Nor will such omission authorize one who has been

[1] Mills v. Gleason, 11 Wis. 470; Mills v. Johnson. 17 Wis. 598.
[2] St. Louis v. Goode, 21 Mo. 216.
[3] Illinois etc. v. County of McLean, 17 Ill. 291.
[4] Morris etc. v. Jersey City, 1 Beas. 227.
[5] Mott v. Pennsylvania etc., 30 Pa. St. 9.
[6] Id.

properly assessed to enjoin the collection of the tax against his own property.[1]

§ 359. Fraud has been held a sufficient ground to warrant a court of equity in a departure from the general rule of non-interference with the collection of taxes. Thus, where an assessor, after having accepted without objection a list of taxable property, afterward and without notice arbitrarily increases the list, the tax payer having no knowledge of the matter until after the time for redress at law has expired by limitation, the collection of the tax may be enjoined.[2] And the relief has also been allowed against the enforcement of a tax imposed for the payment of judgments obtained through fraud and collusion.[3] But equity will not interpose to restrain the collection of a tax for the payment of judgments rendered against a municipal corporation, on the ground that the bonds on which the judgments were founded were without consideration, and were obtained by fraud, where such defense might have been pleaded to the action at law.[4] Nor will the relief be allowed because the judgments are for an amount greater than that actually due, the mistake having occurred through complainant's own carelessness, and no application having been made to correct the judgment in the court in which it was obtained.[5]

§ 360. Where an assessment of personal property has been reduced by a town board of revision, and afterward raised to the original amount by a county board of supervisors without notice of their intended action to the property owner, the tax is regarded to the extent thus increased as an unauthorized assessment by persons having no authority, and as such it may be enjoined.[6]

§ 361. In general courts of equity will not interfere with the collection of taxes because of mistakes in judgment on

[1] Muscatine v. Mississippi etc., 1 Dillon C. C. 536.
[2] Cleghorn v. Postlewaite, 43 Ill. 428.
[3] Newcomb v. Horton, 18 Wis. 566.
[4] Muscatine v. Mississippi etc., 1 Dillon C. C. 536.
[5] Id.
[6] Darling v. Gunn, 50 Ill. 424.

the part of the officers assessing the tax, if they have acted fairly and impartially, and where they are not charged with bad faith.[1] But an exception to this rule has been allowed where, under a mistake as to the place where the personal property of a railroad was to be taxed, its capital stock was taxed in a wrong locality, and in such case an injunction has been granted.[2]

§ 362. But in no case will the collection of a tax be enjoined where it is not shown that the injury resulting from its enforcement would be irreparable, and this fact must appear in the bill by issuable averments.[3] And where the collector and his sureties are able to respond in damages, there being no allegation of irreparable injury, the per-

[1] Le Roy *v.* New York, 4 Johns. Ch. 352. This was a bill for relief against an assessment made to defray the expense of constructing a common sewer in the city of New York, and to enjoin the commissioners from collecting the assessment on the ground that it did not include all property holders benefited by the improvement. Kent, Chancellor, says: "I can not find that the court interferes in cases of this kind, where the act complained of was done fairly and impartially, according to the best judgment and discretion of the assessors; and a precedent, once set, would become very embarrassing and extensive in its consequences. If the power under this statute had been exercised in bad faith and against conscience, I might have attempted to control it; but a mere mistake of judgment in a case depending so much upon sound discretion, can not properly be brought into review, under the ordinary powers of this court. There must have been a thousand occasions and opportunities for the exercise of such an appellate jurisdiction in the history of the jurisprudence and practice of the English Court of Chancery, if such a jurisdiction existed, and yet we find no precedents to direct us. A mistake of judgment in the assessors, upon the matter of fact, what portion or district of the city was intended to be and actually was benefited by the common sewer, can hardly be brought within the reach of that head of equity jurisdiction which relates to breaches of trust. Here is not, strictly speaking, a violation of duty. No bad faith or partiality in the assessors is pretended. The aid of this court might as well be asked to review every assessment of a land tax or a poor rate. I apprehend it would require a special provision by statute to authorize chancery to interfere with these assessments." And see Attorney General *v.* Foundling Hospital, 4 Bro. 165, and Haight *v.* Day, 1 Johns. Ch. 18.

[2] Mohawk etc. *v.* Clute, 4 Paige, 384.

[3] Ritter *v.* Patch, 12 Cal. 298.

son aggrieved will be left to his remedy at law for the trespass.[1]

§ 363. He who would have equity must himself do equity, and where complainant has not paid that portion of the tax which is clearly valid, to which no objection is offered and which can easily be distinguished from the illegal, the injunction will be denied, since the collection of a legal tax will not be restrained to prevent the enforcement of an illegal one.[2] And the bill itself must show what portion of the tax is legal and what illegal, in order that the court may properly discriminate between them.[3] And it has been held that where the valid and the void taxes are separable, and the amount of the valid can be easily ascertained, the party complaining must pay the legal as a condition precedent to relief against the illegal tax.[4]

§ 364. Where one has assented to the levying of a tax, either by directly petitioning that it be assessed for certain purposes, or by standing idly by and failing to avail himself of the remedy provided by law for questioning the regularity of the proceedings, he is estopped from obtaining relief in equity, even though the proceedings were absolutely null and void.[5] Thus, property holders who have petitioned the proper authorities for the paving of a street, and who, during the progress of the work, have made no objection, will not be allowed to enjoin the collection of the assessment. They are in such case considered as having actively consented to the proceedings resulting in the assessment, and their implied

[1] Id.

[2] Hersey *v.* Supervisors etc., 16 Wis. 185; Bond *v.* Kenosha, 17 Wis. 284; Mills *v.* Johnson, 17 Wis. 598; Howes *v.* Racine, 21 Wis. 514; Palmer *v.* Napoleon, 16 Mich. 176; Taylor *v.* Thompson, 42 Ill. 10; Board of Commissioners *v.* Elston, 32 Ind. 27.

[3] Palmer *v.* Napoleon, 16 Mich. 176; Taylor *v.* Thompson, 42 Ill. 10. But in Briscoe *v.* Allison, 43 Ill. 291, it is held that when from the bill the court can ascertain the proportion that the illegal bears to the legal tax, the illegal portion should be restrained and the remainder collected.

[4] Mills *v.* Johnson, 17 Wis. 598.

[5] Kellogg *v.* Ely, 15 Ohio St. 64; Jackson *v.* Detroit, 10 Mich. 248; Weber *v.* San Francisco, 1 Cal. 455; Peoria *v.* Kidder, 26 Ill. 351.

assent will be presumed to the assessment itself.[1] And under such circumstances the question of the legality of the assessment will not vary the case, since, if it be invalid, the remedy of the parties aggrieved is at law.[2] And the owner of city lots who, with full notice of all the proceedings, encourages contractors to go on with the grading of a street and assures them that they shall be paid, is estopped from invoking the aid of equity to enjoin the collection of a special tax upon his lots to pay for such grading.[3]

§ 365. A court of equity is not a court of errors to review the acts of public officers in the assessment and collection of taxes, nor will it revise their decision upon matters within their discretion if they have acted honestly.[4] So where a particular manner is provided by law, or a particular tribunal designated, for the settlement and decision of all errors or inequalities on behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedy thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax. And this upon the ground that where one has a complete and ample remedy at law and slumbers upon his rights, he is estopped from invoking the aid of equity.[5] But an exception has been allowed to the rule where the grievance complained of consisted in the mode and form of the collection of the tax rather than in the rate or assessment, and where no remedy is provided by law for such improper mode and form of collection, an injunction may be allowed.[6]

§ 366. A distinction is sometimes taken as to the nature of the property, whether personal or real, which is assessed or levied upon in satisfaction of the tax. And even in those states which have inclined to depart from the general rule

[1] Motz v. Detroit, 18 Mich. 495.

Id.

[2] Sleeper v. Bullen, 6 Kan. 300.

[4] Livingston v. Hollenbeck, 4 Barb. 9; Clinton etc., Appeal, 56 Pa. St. 315; O'Neal v. Virginia etc., 18 Md. 1. And see Heywood v. Buffalo, 14 N. Y. 534; Mayor v. Meserole, 26 Wend. 132.

[5] Hughes v. Kline, 30 Pa. St. 227; Macklot v. Davenport, 17 Iowa, 379; Merrill v. Gorham, 6 Cal. 41; Peoria v. Kidder, 26 Ill. 351.

[6] Miller v. Gorman, 38 Pa. St. 309.

denying relief in equity against an illegal tax, the courts, while contending for the jurisdiction in cases affecting the title to real estate, nevertheless refuse to interfere where only personal property is involved and leave the parties aggrieved to their remedy at law.[1] And where the bill seeks to restrain a taxing officer from selling personal property for taxes, and complainants show the exact damage in dollars and cents which they would sustain by reason of the sale, an injunction will not be allowed, the proper remedy being at law.[2]

II. Cloud upon Title.

§ 367. Equity will interfere to prevent cloud upon title.
368. Illegality must be *dehors* the record.

§ 367. The most generally recognized exception to the rule that equity will not interfere with the collection of the revenue because of defects or illegalities in the proceedings, is in cases where the proceedings if not enjoined would result in clouding the title to real estate. Thus, where the defect is not merely a formal one, but works a substantial injury to complainant's rights, resulting in a cloud upon his title, the injunction will

[1] Deane *v.* Todd, 22 Mo. 90; Lockwood *v.* St. Louis, 24 Mo. 20; Van Cott *v.* Supervisors etc., 18 Wis. 247. But see, *contra*, Spencer *v.* Wheaton, 14 Iowa, 88. And in Peck *v.* School District etc., 21 Wis. 516, the doctrine is laid down that the objection that the remedy of the party aggrieved should be sought at law rather than in equity must be taken by demurrer or answer, and if not so taken the relief by injunction will be granted. The court, it is held, has power to hear and determine the action, and the objection that complainant has a remedy at law is not jurisdictional, and is no more than a rule of practice in the court of chancery. It may well be doubted whether this doctrine is consistent with the weight of the authorities cited in support of the principles laid down in the preceding sections, since the courts have almost uniformly treated the objection that the remedy was at law as jurisdictional, regardless of whether the question was so presented by the pleadings.

[2] Conley *v.* Chedic, 6 Nev. 222.

be granted.[1] And where the proceedings sought to be set aside are valid upon their face and extrinsic facts are necessary to be proven to show their invalidity or illegality, equity will interfere to prevent a cloud upon title.[2] So where two lots have been assessed together as the property of a person owning but one of them and a gross tax has been imposed upon the two, the case is regarded as falling within the exception and the injunction may be allowed.[3] So, too, where a city charter declares a tax a lien upon the premises on which it is assessed, the tax, if illegal, creates such a cloud upon the title as to warrant an injunction.[4] Nor, in such case, does the fact that there was sufficient personal property out of which the tax might have been collected vary the question or avail against the injunction.[5] And the jurisdiction to thus interfere for the prevention of a cloud upon title is regarded as pertaining to the well-settled powers of equity, which will interfere to prevent such a cloud as tends to diminish the value of the property or cast a doubt upon the title.[6]

§ 368. It is to be observed in this connection that where the relief is sought to prevent a cloud upon title it will only be granted in those cases where the illegality or irregularity complained of exists *dehors* the record. And where the objection to the validity of the tax or assessment appears upon the face of the tax proceedings, or upon the face of the proceedings by which alone the adverse party can claim title to the land sold for the unpaid tax, equity will not enjoin.[7] Thus,

[1] Mitchell *v.* Milwaukee, 18 Wis. 92; Crane *v.* Janesville, 20 Wis. 305; Heywood *v.* Buffalo, 14 N. Y. 534; Mutual etc. *v.* Supervisors etc., 33 Barb. 322; Morris etc. *v.* Jersey City, 1 Beas. 227; Siegel *v.* Supervisors etc., 26 Wis. 70.

[2] Dean *v.* Madison, 9 Wis. 402; Heywood *v.* Buffalo, 14 N. Y. 534.

[3] Crane *v.* Janesville, 20 Wis. 305.

[4] Scofield *v.* Lansing, 17 Mich. 437.

[5] Id.

[6] Dean *v.* Madison, 9 Wis. 402.

[7] Van Rensselaer *v.* Kidd, 4 Barb. 17; Bouton *v.* Brooklyn, 15 Barb. 393; Robinson *v.* Gaar, 6 Cal. 273; Bucknall *v.* Story, 36 Cal. 67; Van Doren *v.* Mayor etc., 9 Paige, 388; Dean *v.* Madison, 9 Wis. 402. And see Wiggin *v.* New York, 9 Paige, 17.

where the assessment proceedings are void upon their face, so that a purchaser at a tax sale under those proceedings would not obtain a *prima facie* title, the remedy at law is perfect and an injunction will be refused.[1] But where by statute a tax deed is made *prima facie* evidence of the regularity of all the proceedings incident to the assessment and sale, if the tax has been imposed contrary to law, such a cloud upon the title will result as to warrant the interference of equity.[2] Thus, where, contrary to a city charter, lots belonging to different owners have been assessed together, instead of separately, and for the improvement of streets not adjacent to the lots, the sale may be enjoined, the defects not appearing on the face of the deed which is, by statute, *prima facie* evidence of title.[3] Mere vagueness, however, or inaccuracy in the description of land to be sold for taxes is not sufficient to warrant an injunction against the sale on the ground of preventing a cloud upon title, since, if the tax is justly due the cloud may easily be avoided by payment.[4] And where the description in a tax deed is so defective as to render the deed utterly void, a court of equity will not interfere.[5]

[1] Van Doren *v.* Mayor etc., 9 Paige, 388.
[2] Palmer *v.* Rich, 12 Mich. 414; Jenkins *v.* Rock County, 15 Wis. 11.
[3] Jenkins *v.* Rock County, 15 Wis. 11.
[4] Burlington etc. *v.* Spearman, 12 Iowa, 112.
[5] Head *v.* James, 13 Wis. 641.

III. Taxes imposed by Municipal Corporations.

§ 369. Rule of non-interference relaxed as to taxes levied by municipal authorities.
370. Legislative authority.
371. Equity will not interfere where legal remedy is sufficient.
372. Special cases illustrative of general rule.
373. Tax assessed for improper purpose may be restrained.
374. Tax levied in violation of city charter may be restrained.
375. Failure to advertise for bids.

§ 369. It will be found on examination that courts of equity have been inclined in the case of assessments by municipal corporations to relax somewhat the stringency of the rule of non-interference as applied to the collection of state taxes. Though it is difficult to perceive any sufficient reason for such distinction, yet the distinction itself remains. Thus, a city assessment without authority of law will be enjoined, even where no question as to cloud upon title is raised.[1] As where a city has attempted under a provision in its charter to levy a tax for subscription to the stock of a railroad, the relief has been granted on the ground that the provision relied upon was unconstitutional and the tax therefore unauthorized.[2]

§ 370. Even though the tax be authorized by act of legislature, yet where the city authorities have disregarded and failed to comply with all the requirements of the statute, equity will enjoin a sale of land for such taxes on the ground that the proceedings are *coram non judice* and void.[3] But though a sale of lands may be enjoined under such circumstances, the court will not interfere with a sale of personalty. And where authority is conferred by statute upon the common council of a city to make an assessment for paving, the court will not restrain the execution of a warrant against the goods

[1] Foster *v.* Kenosha, 12 Wis. 616; Toledo etc. *v.* Lafayette, 22 Ind. 263.
[2] Foster *v.* Kenosha, 12 Wis. 616.
[3] Mayor etc. *v.* Porter, 18 Md. 284.

and chattels of complainant in satisfaction of such assessment because of irregularities in the exercise of the power.[1] But where an act of legislature has extended the city limits by taking in a large amount of lands not necessary for city purposes, the sole object being to make them liable for city taxes, the collection of such taxes may be properly enjoined.[2]

§ 371. Though relief by injunction is, as we have seen in the preceding sections, more freely granted in cases of municipal assessments, still if the objections may be urged and the grievances adjusted in a court of law, equity will not interfere with the assessment.[3] And where, by the proceedings of the corporate authorities in making the assessment, a remedy is provided for all persons aggrieved, and the proceedings may be removed by *certiorari* to the proper tribunal, an injunction will not be granted.[4] And it is to be observed that a court of chancery will not sit as a court of errors to review and correct the proceedings of municipal bodies and inferior political jurisdictions authorized to make assessments, this being matter of legal rather than equitable cognizance.[5]

§ 372. An injunction will not be allowed to restrain the exercise of the municipal authority of a city in the levying and collection of a tax on the ground that the passage of an

[1] Williams v. Mayor etc., 2 Mich. 560.

[2] Langworthy v. Dubuque, 13 Iowa, 86.

[3] McBride v. Chicago, 22 Ill. 574; Ottawa v. Chicago etc., 25 Ill. 43.

[4] Betts v. Williamsburgh, 15 Barb. 255.

[5] Mayor etc. v. Meserole, 26 Wend. 132, overruling same case in 8 Paige, 128; Heywood v. Buffalo, 14 N. Y. 534; Blake v. Brooklyn, 26 Barb. 101. In this case the court say: "If the assessment be illegal or unconstitutional, the plaintiff can not be compelled to pay it, and he need not anticipate in this way (by injunction), this defense to a suit at law. The assessment is not yet laid or its amount ascertained; indeed the work is not done or even commenced, and therefore there can not be a pretense of a cloud upon the title of the land. If an assessment were laid, however, for the expense of this improvement, it is well settled that a bill in equity and an injunction are not the proper means to review or correct such proceedings of a municipal corporation. There are sufficient common law remedies in such cases, and a court of equity will not extend its jurisdiction to review such proceedings, unless they are productive of peculiar or irreparable injury to the land of the plaintiff or must lead to a multiplicity of suits."

ordinance with relation to the tax is in violation of the city charter.[1] Nor will the relief be granted against the levying of taxes by a municipal corporation because of the extension of the town limits by act of legislature, contrary to the wishes of the property owners in the tract included in the extension, the statute being held constitutional.[2] But where the city authorities have exempted certain property from taxation, thereby increasing the burden upon other property, the exemption being illegal, an injunction will be granted to prevent the sale for taxes of the lands so assessed upon the ground that the omission was intentional and not the result of accident.[3]

§ 373. Where a city has itself created a nuisance by the construction of its streets in such a manner as to cause the water to stand upon certain lots, it can not, for the purpose of abating the nuisance, tax the lots themselves, and a sale of such lots for payment of the tax will be enjoined.[4] And a city being regarded in the nature of a trustee for the corporators, an unauthorized appropriation of its funds, as for the celebration of the Fourth of July, may be enjoined by tax payers.[5]

§ 374. Where in violation of its charter a municipal corporation is about to issue its bonds and securities for a purpose unauthorized by law, and to levy a tax for the payment thereof, property owners liable to such tax are entitled to an injunction against the municipal authorities upon the ground of preventing a multiplicity of suits.[6] But such individual tax payers can not restrain the municipal authorities from controlling and disposing of so much of the tax as has already been collected, and if any illegal appropriation of such money is attempted or threatened it can only be

[1] Page *v.* St. Louis, 20 Mo. 137.

[2] Manly *v.* Raleigh, 4 Jones Eq. 370.

[3] Weeks *v.* Milwaukee, 10 Wis. 242; Hersey *v.* Supervisors etc., 16 Wis. 185.

[4] Weeks *v.* Milwaukee, 10 Wis. 242.

[5] New London *v.* Brainard, 22 Conn. 552.

[6] Coulson *v.* Portland, Deady's Reports, 481.

restrained upon the complaint of some one representing the entire public to whom the money belongs.[1]

§ 375. Although a city charter provides that no contracts beyond a certain sum shall be entered into by the city except with the lowest bidder, after advertising, an injunction will not lie at the suit of adjacent lot owners to restrain the enforcement of a tax for paving streets with a patented pavement which is the exclusive property of one firm.[2] Nor will the fact that the city authorities have not complied with their charter in ordering street improvements and in advertising for bids, warrant an injunction in favor of an adjacent lot owner before any taxes have been assessed or levied, or any injuries sustained.[3]

IV. Bounties.

§ 376. Bounties to soldiers unauthorized by legislature will be enjoined.
377. Statute must be strictly complied with.
378. Parties; dissolution.

§ 376. A branch of the jurisdiction of equity in restraint of taxes of recent origin is that which is exercised in cases of taxation for the payment of bounties to soldiers, or for the purpose of freeing a town or city from a draft of its citizens for military service. The general rule as regards municipal taxes for such purposes is, that where the municipal authorities are proceeding without legislative sanction an injunction will be allowed to restrain such misappropriation of the public funds.[4] The ground for relief in this class of cases is that the remedy at law by suit to recover back the tax paid

[1] Id.

[2] Hobart *v.* Detroit, 17 Mich. 246; Harlem etc. *v.* Mayor etc., 33 N. Y 309. And see dissenting opinion of Dixon, C. J., in Dean *v.* Charlton, 23 Wis. 590. But see, *contra*, Dean *v.* Charlton, 23 Wis. 590.

[3] Ballard *v.* Appleton, 26 Wis. 67.

[4] Webster *v.* Harwinton, 32 Conn. 131; New London *v.* Brainard, 22 Conn. 552; Fiske *v.* Hazard, 7 R. I. 433; Drake *v.* Phillips, 40 Ill. 388. But see, *contra*, Truesdell's Appeal, 58 Pa. St. 148.

is inadequate.[1] Where, however, a town is authorized by act of legislature to levy a tax for relieving its inhabitants from draft, the collection of the tax will not be enjoined, but the persons aggrieved will be left to pursue their remedy at law.[2] Even where a town originally had no authority to vote such a tax, if a subsequent act of the legislature has authorized it to ratify and confirm such vote, and this has been done, an injunction will not be allowed.[3]

§ 377. But, though equity will not interfere with a bounty tax authorized by act of legislature, yet the terms of the statute must be complied with in all essential points. And where a tax is voted the next day after the passage of the act authorizing it and before the requisite notice prescribed by the statute could possibly be given, such a notice being indispensable to the validity of the tax, its collection will be enjoined.[4] And where the quota of the town is already filled at the time of the passage of the law and there is no reasonable probability of more soldiers being required, such a tax is unauthorized and will be restrained.[5] So where by the terms of a city charter the real estate and personal property of its inhabitants are exempt from taxation for county purposes, a bill in chancery lies to enjoin the collection of a bounty tax sought to be imposed by the county, even though the tax be authorized by act of legislature.[6]

§ 378. It is held that an illegal tax for bounty purposes will not be restrained where the complainant files the bill only in his own individual behalf, and where it does not appear that he has an adequate remedy at law, or that the proceedings will be productive of irreparable injury, or will lead to a multiplicity of suits, or a cloud upon title.[7] And a

[1] Webster *v.* Harwinton, 32 Conn. 131.

[2] Hoagland *v.* Delaware, 2 C. E. Greene, 106.

[3] Baldwin *v.* North Branford, 32 Conn. 47; Booth *v.* Woodbury, Ib. 118. And see as to dissolution of the injunction under such a statute, Bartholomew *v.* Harwinton, 33 Conn. 408.

[4] Vieley *v.* Thompson, 44 Ill. 9.

[5] Id.

[6] Supervisors etc. *v.* Campbell, 42 Ill. 490.

[7] Scribner *v.* Allen, 12 Minn. 148.

perpetual injunction granted against the payment of a bounty voted by a town meeting to drafted men or their substitutes, may be dissolved upon the passage of an act of legislature legalizing such vote.[1] And in the absence of any allegation of fraud the collection of a tax in payment of a bounty for the destruction of wolves will not be restrained, where such bounty has been authorized by the legislature and by vote of the town.[2]

V. Special Cases.

§ 379. Injunctions against United States revenue laws.
380. National banks.
381. Preliminary proceedings not enjoined; other cases.
382. Franchises; defect in injunction bond.
383. Taxes in aid of railways.
384. Depreciation in value no ground for relief.
385. Jurisdiction having attached, court will give all necessary relief.
386. Execution against defaulting tax collector will not be enjoined.

§ 379. The Circuit Courts of the United States will interfere to restrain the collector of internal revenue from the collection of a tax improperly assessed.[3] And it has been held that the courts of a state may also interfere to restrain revenue officers of the United States from collecting a revenue tax unauthorized by law.[4] But a bill to enjoin the enforcement of a tax under the revenue laws, in the nature of a bill of peace, will not lie in favor of a number of persons joined as complainants whose only interest in common is in resisting the tax, they having no common interest in the subject matter on which it is levied.[5] And where many persons are affected

[1] Bartholomew *v.* Harwinton, 33 Conn. 408.

[2] Mooers *v.* Smedley, 6 Johns. Ch. 28.

[3] Georgia *v.* Atkins, 1 Abb. U. S. R. 22. And this doctrine would seem to be sustained by the reasoning of the court in Cutting *v.* Gilbert, 5 Blatch. 259, *infra*, though the injunction was refused in that case because of improper joinder of parties. But see Powell *v.* Redfield, 4 Blatch. 45.

[4] Georgia *v.* Atkins, 35 Geo. 315.

[5] Cutting *v.* Gilbert, 5 Blatch. 259.

by the tax, and the remedy by suit in equity will involve vexatious litigation the court will not grant the injunction.[1]

§ 380. Where the tax upon shares in national banks exceeds the rate of taxation imposed upon banks of the state, its collection may be enjoined, but only upon payment of a sum which shall be a fair equivalent for the tax on the banks of the state.[2] But a national bank is not entitled to an injunction restraining the collection of a tax upon its shares of stock on the ground that they are illegally assessed against the bank instead of the shareholders, it not appearing that an action for damages would not afford a complete remedy, and no circumstances of irreparable mischief being shown.[3] In such case the relief is also withheld on the ground that the bank has no equities, since its property is not in jeopardy but only the shares of the stockholders.[4]

§ 381. The proceedings preliminary to the actual levy of a tax will not be enjoined, whether it is about to be imposed upon personalty or realty, since the person at whose instance the suit is brought can not from the nature of the case obtain redress until the amount of his own tax has been ascertained by actual levy.[5] And a private tax payer, suffering no particular grievance by the tax imposed, can not assume on behalf of the public to restrain the proceedings, but he can only enjoin where his individual grievances are distinct from those of the public at large.[6] Nor will a tax be enjoined because complainant has paid previous assessments which were illegal, and which he now seeks to have set off against the tax in question.[7] Nor will equity interfere if the proceedings, originally defective, have been subsequently cured by act of legislature.[8]

§ 382. Where a tax upon a franchise has been illegally

[1] Id.
[2] Frazer v. Siebern, 16 Ohio St. 614.
[3] First National Bank v. Meredith, 44 Mo. 500.
[4] Id.
[5] Miller v. Grandy, 13 Mich. 540.
[6] Id.
[7] Fremont v. Early, 11 Cal. 361.
[8] Cowgill v. Long, 15 Ill. 202.

imposed the proper remedy is at law and no relief will be allowed in equity against its collection.[1] Nor will the collection of an assessment for paving and improving streets be enjoined on the ground that such paving is an interference with the rights and franchises of a plank-road company having the right to use the street, the injunction being sought, not by the company, but by an adjacent lot owner.[2] But where the writ has been properly granted in other respects it will not be reversed because the bond was for a sum much less than the amount of the tax and costs, if the party against whom the injunction was granted is not injured by such deficiency.[3]

§ 383. The issuing of bonds and the levying and collecting of a tax in aid of subscriptions to a railroad by a county court, will not be enjoined on the ground of want of jurisdiction in the court to take such proceedings without a vote of the people, since a sale of the tax payer's property under such proceedings would not divest the owner of his title, and he can maintain an action at law for the property and for damages for its detention.[4] And an entire tax or assessment should not be enjoined on the ground that too much has been assessed.[5]

§ 384. Great depreciation in the value of a particular property, as a watering place, resulting from the condition of the country during a civil war, affords no ground for relief in equity against a tax assessed against such property upon its valuation before the war; while such considerations may be properly addressed to the legislative branch of the government, they can have no weight with the judicial, and equity

[1] DeWitt v. Hays, 2 Cal. 463.

[2] Bagg v. Detroit, 5 Mich. 336. And in Maryland it is held that unless the owners of a majority of the feet fronting on a street to be paved assent in writing to the paving, the proceedings of the city authorities are void, and equity has jurisdiction on the application of such owners as have not assented to restrain the sale of property for such paving. Holland v. Mayor etc., 11 Md. 186; Bouldin v. Same, 15 Md. 18.

[3] Drake v. Phillips, 40 Ill. 388.

[4] State v. Parkville etc., 32 Mo. 496, approving Sayre v. Tompkins, 28 Mo. 443.

[5] Indianapolis v. Gilmore, 30 Ind. 414.

will not assume jurisdiction to adjust the inequalities and misfortunes produced by civil war.[1]

§ 385. Where the jurisdiction of equity has attached for the purpose of annulling a tax certificate improperly issued and void, the court may properly proceed to enjoin a sale of personal property to satisfy the tax, the relief being allowed upon the familiar principle that, its jurisdiction having once attached, the court should give all the relief to which the party may be entitled, although some portion of it might otherwise have been recoverable in an action at law.[2]

§ 386. A court of equity will not interfere to prevent the collection of an execution against a defaulting tax collector and his sureties, since if the parties aggrieved are entitled to any judicial interference in such a case their remedy at law is as ample and complete as they could have in equity.[3]

[1] White Sulphur Springs Co. v. Robinson, 3 West. Va. 542.
[2] Hamilton v. Fond du Lac, 25 Wis. 490.
[3] Gunby v. Bell, 40 Geo. 133.

CHAPTER VIII.

OF INJUNCTIONS AGAINST HIGHWAYS AND RAILROADS.

§ 387. Courts will balance relative convenience and inconvenience.
388. Injury must be irreparable; estoppel; relative injury.
389. Injunction may be allowed pending trial of right.
390. Apprehensions of future injury not sufficient.
391. Failure to compensate owner for damages a ground of injunction.
392. Illustrations of the rule.
393. Further illustrations of the rule.
394. Statutory remedy must be exhausted before equity will interfere.
395. Where legal remedy is insufficient injunction may be allowed.
396. Non-compliance with contract no ground for injunction.
397. Owner's laches a bar to relief.
398. Acquiescence a bar to relief.
399. Adjoining proprietors; parties; inadequate compensation.
400. Tender of damages.
401. Railway in default can not enjoin owner.
402. Duration of injunction.
403. Injunction against municipal corporations allowed with much caution.
404. Opening and widening of streets.
405. Railways held to strict compliance with conditions of grant.
406. Illustration of the rule.
407. Court will not interfere with possession.
408. Misappropriation of land dedicated to use of public for streets may be enjoined.
409. Railway in a city not a nuisance *per se;* may, however, be regulated in equity.
410. Special statutory remedy must be followed.
411. Injunction granted pending question as to legal authority to close a road.
412. Unauthorized extension of railway; forcible opening of highway.
413. Irreparable injury will warrant the relief.
414. Land acquired by a railway for particular purposes.
415. Where body authorizing construction of railway has acted *ultra vires*, road may be enjoined.
416. Planting of trees; construction of levees.

§ 417. Great caution necessary in exercising the jurisdiction.
418. Improper conduct of a common carrier may be restrained.

§ 387. Courts of equity are frequently called upon to interfere by injunction with the construction of highways and railroads in such manner or under such circumstances as would be productive of irreparable injury. In exercising its jurisdiction over cases of this nature a court of equity will in the use of a sound discretion balance the relative inconvenience and injury which is likely to result from granting or withholding the writ, and will be largely governed by such circumstances in determining upon the relief. And where an injunction restraining the use of a railway would not only be productive of great injury to the railway company and to the public, but would result in no corresponding advantage to any one, not even to the persons asking the injunction, it will not be granted.[1]

§ 388. In the absence of any allegations of irreparable injury an injunction will not be granted against the construction of streets or roads, since without such injury no sufficient reason exists for seeking redress in an equitable rather than a legal forum.[2] Nor will the relief be granted in favor of one who has been guilty of great laches in the assertion of his rights and who has by his own conduct given an implied assent to the construction of the work which he afterward seeks to restrain. Thus, where the owner of land has silently stood by and neglected to assert his rights, and has permitted a railway company, authorized by act of parliament to enter upon his land, to proceed with the erection of its works for a considerable length of time without interruption or complaint, he is estopped from the aid of equity for the prevention of the work.[3] And where the work is of great magnitude and involves considerable expense, as in the construction of a railway, if it appears that the injury which would result to the defendant by granting the relief prayed, in case the result

[1] Torrey v. Camden etc., 3 C. E. Green, 293. And see Greenhalgh v. Manchester etc., 3 Myl. & C. 784, *infra*.

[2] Holmes v. Jersey etc., 1 Beas. 299.

[3] Greenhalgh v. Manchester etc., 3 Myl. & C. 784.

should prove it to have been wrongly granted, is greater than that which would result to complainant from a refusal of the injunction in the event of the legal right being proved to be in his favor, the court will not interpose.[1]

§ 389. Where an action at law is pending for the purpose of testing the legal right of opening a highway an injunction may be allowed to restrain its opening pending the trial of right.[2] And if the injury resulting from the road which it is sought to restrain is likely to prove irreparable in its nature, and if it is not susceptible of adequate compensation in pecuniary damages, a proper case is presented to warrant the interference of equity.[3] Upon similar grounds of the inadequacy of the remedy at law, an injunction may be allowed upon allegations of defendant's insolvency, since such insolvency would render futile any attempt to recover pecuniary damages for the loss incurred.[4]

§ 390. It is frequently a matter of difficulty to determine how far the work contemplated must have proceeded before a court of equity may be properly called upon to interfere. It would seem, however, that apprehensions of future injury, even though orders may have been given for the preliminary steps toward the construction of a road, do not constitute sufficient ground for interference. Thus, the presenting of a petition to the commissioners of highways for a private road and an expressed determination on their part, by ordering a survey of the road, to grant the petition, will not authorize a court of equity to enjoin the proceedings.[5]

§ 391. The ground upon which the aid of equity is most frequently invoked to restrain the opening of roads and railroads is the neglect or refusal to make proper compensation for the land appropriated to the use of the road. The general rule applicable to cases of this nature is, that failure or omission to compensate the owner of land, or to tender compensa-

[1] Id.
[2] Champlin v. Morgan, 18 Ill. 293.
[3] Champion v. Sessions, 1 Nev. 478.
[4] Id.
[5] Winkler v. Winkler, 40 Ill. 179.

tion, for damages incurred by locating a road over his premises, will authorize a court of equity in restraining proceedings until the damages are properly adjusted.[1] The reasoning in support of the rule is found in the danger of such serious and irreparable injury resulting from the continuation of the work that the tardy process of courts of law would afford but poor relief. An injunction is therefore regarded as the most appropriate and efficient remedy for the protection of the rights assailed and for the prevention of such irreparable injury as would be likely to result from a continuance of the proposed work.[2]

§ 392. Where a railway company claims and is attempting to exercise the right of entering upon real estate for the construction of its road, under color of law, but without having complied with the requirements of the statute, an injunction will be allowed to prevent further proceedings.[3] And an

[1] Richards *v.* Des Moines etc., 18 Iowa, 259; Sidener *v.* Norristown etc., 23 Ind. 623; Commissioners etc. *v.* Durham, 43 Ill. 86; Horton *v.* Hoyt, 11 Iowa, 496; Harness *v.* Chesapeake etc., 1 Md. Ch. 248; Western etc. *v.* Owings, 15 Md. 199; Ross *v.* Elizabeth Town etc., 1 Green Ch. 422; Powers *v.* Bears, 12 Wis. 213. And see Browning *v.* Camden etc., 3 Green Ch. 47; Bonaparte *v.* Camden etc., Baldw. 227; Penrice *v.* Wallis, 37 Miss. 172; Bensley *v.* Mountain etc., 13 Cal. 306. And it was stated by Lord Cottingham, in a recent English case, to be most essential to the interests of the public, that such jurisdiction should exist, and should be exercised whenever a proper case for it is brought before the court, "otherwise the result may be, that, after your house has been pulled down, and a railway substituted in its place, you may have the satisfaction, at a future period, of discovering that the railway company were wrong." River etc. *v.* North etc., 1 Railway Cases, 135.

[2] Commissioners etc. *v.* Durham, 43 Ill., 86; Sidener *v.* Norristown, 23 Ind. 623.

[3] Browning *v.* Camden etc., 3 Green Ch. 47; Bonaparte *v.* Camden etc., Baldw. 227. The grounds upon which courts of equity interfere to prevent railway companies from illegally appropriating private property have been well stated as follows: "The injury complained of as impending over his (complainant's) property is its permanent occupation and appropriation to a continuing public use which requires the divestiture of his whole right, its transfer to the company in full property, and his inheritance to be destroyed, as effectively as if he had never been its proprietor. No damages can restore him to his former condition; its value to him is not money, which money can replace; nor can there be any specific

injunction may be granted to prevent a railway from further occupancy of land for which it has not made compensation, even though the company has actually tendered an amount agreed upon by arbitrators chosen under a statute held to be unconstitutional.[1] So it has been held that courts of equity may properly interfere in cases of this kind without reference to the question whether the injury complained of is irreparable in its nature.[2] Nor is it necessary that there should be any threat or declared intention on the part of the railway company to go on with the work, if it is doing preparatory acts indicating an intention to proceed.[3] And where a railway company has been enjoined from the use of land without having made payment or tender of damages as provided in its charter, and without consent of the owner, the injunction will not usually be dissolved on motion before a hearing upon the merits.[4]

§ 393. In conformity with the general principles laid down in the previous sections, it is held that where a railway company neglects and refuses to pay the damages properly assessed against it for the right of way over complainant's land, and continues to operate its road over the land in question, an injunction will be allowed until payment has been made of the damages assessed.[5] And where the company is proceeding, under claim and color of right, to permanently locate its road

compensation or equivalent; his damages are not pecuniary, *vide* 7 Johns. Ch. 731; his objects in making his establishment were not profit, but repose, seclusion, and a resting place for himself and family. If these objects are about to be defeated, if his rights of property are about to be destroyed, without the authority of law; or if lawless danger impends over them by persons acting under color of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass, a court of equity will enjoin its commission." Baldwin, J., in Bonaparte *v.* Camden etc., Baldw. 231.

[1] Powers *v.* Bears, 12 Wis. 213. And see Shepardson *v.* Milwaukee etc. 6 Wis. 605.

[2] Western etc. *v.* Owings, 15 Md. 199.

[3] Bonaparte *v.* Camden etc., Baldw. 227.

[4] Ross *v.* Elizabeth Town etc., 1 Green Ch. 422.

[5] Richards *v.* Des Moines etc., 18 Iowa, 259.

over one's land without having made any compensation therefor, equity will interpose to prevent the construction of the road.[1] So commissioners of highways, who are proceeding to open a road without having adjusted the damages with the owner of land over which the road passes, will be restrained.[2]

§ 394. The rule as above stated is to be accepted with this qualification: that where a statutory remedy is provided for obtaining damages for private property taken in the construction of roads, or for the relief of such persons as consider themselves aggrieved in the assessment of damages for their property taken, such statutory remedy must be first exhausted before equity will extend its protection.[3] Thus, where a statute provides a mode of obtaining damages for property taken for the use and construction of a railway, but the owner of the land has neglected to avail himself of the mode of relief thus pointed out, he will not be allowed to enjoin the construction of the road because of the non-payment of damages.[4] And the owner of land through which a city has laid out a street, and who is dissatisfied with the assessment of damages, but has failed to avail himself of a legal remedy provided by statute, is not entitled to an injunction against the city authorities to prevent their entering upon his land.[5]

§ 395. Where the legal remedy is plainly insufficient to meet the necessities of the case and to avert the threatened injury, equity will not compel the person aggrieved to await the tardy action of the ordinary tribunals. Thus, where the power of taxation of a municipal corporation is so inadequate that compensation can not, within a reasonable time, be made to the owner of private property for damages resulting to him by laying out a street through his property, the opening of the street will be enjoined until security is given for all damages which may be incurred.[6]

[1] Sidener *v.* Norristown, 23 Ind. 623.

[2] Commissioners etc. *v.* Durham, 43 Ill. 86.

[3] Nichols *v.* Salem, 14 Gray, 490; New Albany etc. *v.* Connelly, 7 Ind. 82. And see Parham *v.* Justices etc., 9 Geo. 341.

[4] New Albany etc. *v.* Connelly, 7 Ind. 82.

[5] Nichols *v.* Salem, 14 Gray, 490.

[6] Keene *v.* Bristol, 26 Pa. St. 46.

§ 396. While the jurisdiction of equity to prevent by injunction the use of private property for railway purposes without compensation is, as we have already seen, freely exercised, the non-compliance by a railway company with its contract for the payment of damages to the owner of the land, who has voluntarily conveyed the right of way to the company upon its promise to pay, constitutes no sufficient ground for an injunction, even under a statute authorising injunctions against railways to prevent their use of private property without compensation.[1] Such a statute is to be construed as applying only to cases where the property is appropriated by the road without consent of the owner, and he having voluntarily conveyed the right of way is barred from asserting his claim to relief in equity, the remedy being at law upon the agreement of the company to pay for the land taken.[2] And it may be laid down as a general rule that the violation or non-performance by a railway company of its contracts with reference to the construction of its road, constitutes no ground for the interference of equity to restrain such construction. In all such cases the remedy at law for violation of contract is ample, and equity will not entertain jurisdiction.[3]

§ 397. As in all cases of the exercise of the strong arm of equity by injunction, the right to the relief may be lost by one's own negligence and delay in seeking protection. And where the owner of land over which a railway has been constructed has stood quietly by and neglected to insist upon compensation at the time his land was taken, and has waited until the road was in full operation before asserting his rights, he will not be permitted to restrain its operation.[4] In such

[1] Vilas v. Milwaukee etc., 15 Wis. 233.

[2] Id.

[3] Gallagher v. Fayette etc. 38 Pa. St. 102.

[4] Hentz v. Long Island etc., 13 Barb. 646; Erie etc. v. Delaware etc., 6 C. E. Green, 283; Goodin v. Cincinnati etc., 18 Ohio St. 169. And in the case last cited the court say, Welch, J.: "Where a party stands by, as we must presume the plaintiffs to have done in the present case, and silently sees a public railroad constructed upon his land, it is too late for him, after the road is completed, or large sums have been expended on the faith of his apparent acquiescence, to seek by injunction, or otherwise, to deny to the

case an injunction, if granted at all, should only be allowed as a last resort, and after all ordinary means of relief have proved ineffectual.[1]

§ 398. But, where the owner of real estate has invited a railway company to enter upon his land and has promised a right of way, though his promise, being verbal, is not binding, yet if he allows the company to go on with the construction of its road, he can not afterward restrain the use of the track over his land until compensation is made.[2] And where a company has been permitted under claim of right for twenty years to occupy the street of a city fronting complainant's premises, without objection or remonstrance, and by such long acquiescence has been induced to enter into a contract with the city binding itself to build a depot and platform in such manner as will cause but little inconvenience to complainant in addition to that arising from defendant's track, an injunction will not be granted to restrain the erection.[3]

§ 399. Where adjoining proprietors of real estate are entitled to compensation for their interest or property in a street appropriated by a railway company, an injunction will be granted to prevent such appropriation until due compensation is made.[4] But the people, being the aggregate body politic, and having no property traversed by the line of the proposed road, and therefore no property rights to be pro-

railroad company the right to use the property. Considerations of public policy, as well as recognized principles of justice between parties, require that we should hold in such cases that the property of the owner can not be reclaimed, and that there only remains to him a right of compensation. The injunction in the present case might have been sought at the first known attempt, or even threat to despoil the canal, or to construct the railroad upon its line. The omission to do so is an implied assent. The work being completed, the public, as well as those directly interested in the road, as stockholders and creditors, have a right to insist on the application of the rule that he who will not speak when he should, will not be allowed to speak when he would."

[1] Hentz *v.* Long Island etc., 13 Barb. 646.

[2] Pettibone *v.* LaCrosse etc., 14 Wis. 443.

[3] Higbee *v.* Camden etc., 5 C. E. Green, 435.

[4] People *v.* Law, 34 Barb. 494.

tected, are not entitled to such relief.[1] And where a municipal corporation, under claim and color of right, enters upon and takes private property for public uses, giving the owner a grossly inadequate compensation for the damages incurred, if the steps taken are regular in form so that the illegality does not appear on the face of the proceedings themselves, an injunction will be granted, the common law remedy by *certiorari* being insufficient.[2]

§ 400. The question of a tender of the damages incurred in the opening of highways may have considerable weight in determining whether the injunction shall be permitted, and an actual tender of damages may be sufficient to bar the person aggrieved from relief in equity. Thus, where all the proceedings required by law for the opening of a public highway have been fully complied with, and damages for the land condemned have been properly assessed and tendered the owner, who refuses them, he will not be allowed to enjoin an officer from opening the highway.[3] But if damages for the land appropriated be not tendered the owner or his agent, he may properly enjoin proceedings for the opening of the road.[4]

§ 401. The owner of land over which a railway passes will not be restrained at the suit of the company from exercising acts of ownership over the land, where the company is itself in default in the payment of damages for the land appropriated. Thus, where the company has agreed with the owner to submit the question of damages to arbitration, it will not be permitted to enjoin him from asserting and exercising his ownership over the premises so long as it is in default in the payment of the sum agreed upon by the arbitrators; in such case the company will itself be enjoined from using the premises until the amount is paid.[5]

§ 402. The object of an injunction, in the class of cases

[1] Id.
[2] Baldwin v. Buffalo, 29 Barb. 396.
[3] Creanor v. Nelson, 23 Cal. 464.
[4] Curran v. Shattuck, 24 Cal. 427.
[5] Stewart v. Raymond etc., 7 Miss. 568.

under consideration, being the protection of the property owner from such loss and injury as would result from taking his property without compensation, it will be enforced only so long as may be necessary to secure this end. And where a bill is filed to restrain county authorities from opening a highway on the ground that they have not assessed the damages to property holders and provided for the payment thereof as required by law, the officers will only be enjoined until such time as they shall have complied with the requirements of the law and made suitable provision for damages incurred; and it is error in such case to make the injunction perpetual.[1]

§ 403. The jurisdiction of equity in restraint of the action of municipal corporations in regulating streets and highways is exercised with much caution, and is not regarded as a favorite jurisdiction with the courts. In the absence of allegations of irreparable injury, equity will hesitate to interfere where the effect of an injunction would be to review the action of such inferior political tribunals, and thus practically constitute a court of equity a court of errors to sit in review of the proceedings of other tribunals. And with the control of matters resting largely in the discretion of municipal authorities, equity will not ordinarily interfere. Thus, a municipal corporation will not be enjoined in the exercise of its control over the regulation of streets and the laying down of curbstones on a proposed line where no irreparable injury is shown as likely to ensue, the sole equity of the bill resting in the fact that the curbstones are not being established on the true line.[2] Nor will the fact that such action of the city authorities may involve some expense to complainant and lessen the value of his property, afford sufficient ground to warrant a departure from the rule and authorize an injunction against the proceedings.[3]

§ 404. An injunction will not be allowed to prevent the authorities of a city from exercising their control over the

[1] Champion v. Sessions, 2 Nev. 271.
[2] Holmes v. Jersey City, 1 Beas. 299.
[3] Id.

opening or widening of public streets or highways, or from interfering therewith at the suit of one whose only right is based on twenty years adverse user and possession. *Nullum tempus occurrit regi*, and in the absence of other equities such adverse possession will not warrant an injunction.[1] Nor will equity interpose to prevent the commission of alleged torts or trespasses which consist simply in such acts as are incident to the widening of a street and the removal of a portion of a sidewalk under proper authority, but will leave the parties to such redress as is afforded by the ordinary legal tribunals.[2]

§ 405. Courts of equity are inclined to hold railway companies to a strict compliance with the terms and conditions upon which they have been permitted to enter upon land necessary for the construction of their lines, and in default of compliance with such conditions they are not entitled to the protection of equity. Thus, where a railway company is forbidden by statute from constructing its road upon the streets of an incorporated city without the assent of the corporate authorities, and where the city has granted a right of way to the company upon certain express conditions, which have not been fulfilled, the authorities will not be enjoined from re-entering and taking possession of the grounds granted

[1] Cross v. Mayor etc., 3 C. E. Green, 305; Tainter v. Mayor etc., 4 C. E. Green, 46. This was a bill for an injunction against the mayor and corporate authorities of the city of Morristown to restrain the removal of trees, fences and shrubbery in widening a street upon which complainant had encroached. Complainant relied, among other points, upon possession for a period of more than twenty years. Zabriskie, Chancellor, in passing upon the case, says: "The possession for over twenty years can avail the complainant nothing. It is well settled that time does not run against the state, or the public, by analogy to the statute of limitations against individuals, but only where the state or public are expressly included. This is a wise and wholesome principle that I feel no inclination to disregard or to narrow. To protect highways from encroachments that it is the business of no one to resist, requires that the public be allowed to resume its rights at any distance of time, disregarding any loss to those who have appropriated and erected improvements on the public domain, or to the more innocent purchasers from them."

[2] Cross v. Mayor etc., 3 C. E. Green, 305.

the railway company, the privilege of re-entering in case of default on the part of the company having been reserved in the contract.[1]

§ 406. In conformity with the general rule laid down in the preceding section, requiring a strict compliance on the part of railway companies with the conditions annexed to the grant of a right of way, it has been held that where a railway has been permitted to enter one's land and construct its road on condition of refraining from a specific injury irreparable in its nature and not easily estimated in damages, an injunction will lie to restrain the violation of such condition.[2] But where, as between a railway and canal company, an injunction has been granted restraining the one from locating its route on the ground of prior and paramount right of choice in the other, if it appears that the defendant is properly entitled to a priority of choice in the selection of ground for its route, the injunction will be dissolved.[3]

§ 407. The sole object of a preliminary injunction being to protect the property or rights in controversy until a final hearing upon the merits, a court of equity will not interfere to take property out of the possession of one party and put it into the possession of another. And where complainants allege that they are entitled to the possession of a railway, but that defendants are in actual possession under claim of right, it is improper to restrain defendants from using the road until the right can be determined.[4]

§ 408. Any use of public streets for purposes unauthorized by the dedication of the land to the public, or by the law under which the dedication was made, may be enjoined where special injury is shown to result to the party complaining. Thus, the laying of the track of a railway company over land which has been dedicated to the public use for streets, being unauthorized by the dedication to the public use, will be

[1] Pacific etc. v. Leavenworth, 1 Dillon's C. C. 393.
[2] Unangst's Appeal, 55 Pa. St. 128.
[3] Canal Company v. Railroad Company, 4 Gill & J. 1
[4] Farmers etc. v. Reno etc., 53 Pa. St. 224.

enjoined.[1] And in such case the injunction will be granted at the suit of the owner of the fee on the ground that the use of the streets for such unauthorized purpose is a special injury to him.[2] But where the charter of a street railway authorizes the construction of its track through the streets of a city, it is not regarded as in violation of the provision of the constitution prohibiting the taking of private property without compensation, and an injunction will not be allowed. Such a provision in a charter is regarded rather as promoting the legitimate use of the highway, and the exercise of the public right of travel, and not as the taking of private property without compensation.[3]

§ 409. The construction of a railway in a city is not regarded as a nuisance *per se*, and the laying of its track along a public street will not be enjoined on that ground.[4] Such control may, however, be exercised by a court of equity over the particular manner of construction as is necessary for the prevention of serious and irreparable injury. And where a railway company is erecting an arch over a mill race in such manner as to be productive of serious injury to the mill, it may be enjoined from making its arch of less than certain specified dimensions, such as will obviate the injury.[5] So where a railway company is proceeding to enter upon private property for the purpose of locating its road, an injunction may be granted until the opening of a street through which the road is, by its act of incorporation, required to pass.[6]

§ 410. In conformity with the general principle that equity will not interfere where there is ample remedy at law, an injunction will not be allowed against the exercise of the franchise of a road on grounds which should be urged at law. Thus, where a statute gives a special remedy at law against a plank-road company for neglecting to keep its road in repair,

[1] Schurmeier *v.* St. Paul etc., 10 Minn. 82.
[2] Id.
[3] Hinchman *v.* Paterson etc., 2 C. E. Green, 75.
[4] New Albany etc. *v.* O'Daily, 12 Ind. 551.
[5] Coats *v.* Clarence etc., 1 Russ. & M. 181.
[6] Jarden *v.* Philadelphia etc., 3 Whart. 502.

equity will not entertain jurisdiction to restrain it from collecting its tolls until the proper repairs are made, but will leave the party complaining to avail himself of his legal remedy.[1]

§ 411. A court of chancery may, it would seem, restrain the commission of an act which is likely to result in irreparable injury to an individual or to be prejudicial to the public, pending proceedings before the proper tribunal to determine as to the authority to commit the act. And where an injunction has been granted to restrain the closing up of a road until defendant can show some legal authority for his action, it will not be dissolved in the absence of any showing of such authority.[2]

§ 412. The unauthorized extension by a railway company of its track is the attempted exercise of a valuable franchise, and is of itself sufficient ground for a perpetual injunction.[3] But where a road has been properly discontinued, the forcible reopening thereof and removal of fences necessary in reopening it will not authorize a court of equity in interfering. Such acts are regarded as mere trespasses for which the law affords ample relief and they will not be enjoined in equity.[4]

§ 413. It may sometimes happen from the peculiar circumstances of a particular case that an injury, ordinarily susceptible of relief at law, is so irreparable in its character as to require the interposition of the strong arm of equity for its prevention. Thus, where it is alleged in the bill that complainant's premises, through which it is proposed to construct a road, are of symmetrical proportions and easily cultivated, and that the passage of the proposed road through the premises will greatly disfigure them and increase the expense and difficulty of their cultivation, an injunction will issue. Under such circumstances the relief is extended on the ground that the injury, being irreparable in its character and of con-

[1] Commonwealth *v.* Wellsboro' etc., 35 Pa. St. 152.
[2] Williamson *v.* Carnan, 1 Gill. & J. 184.
[3] People *v.* Third Avenue etc., 45 Barb. 63.
[4] Nichols *v.* Sutton, 22 Geo. 369.

tinuing duration, can not be remedied by an action at law for damages.[1]

§ 414. Equity will sometimes interfere with the construction of public works for the purpose of protecting parties in the enjoyment of their premises for the particular purposes for which they were acquired. Thus, commissioners of highways will be enjoined from laying out a road across complainant's railway track and grounds acquired for engine houses and other like uses of the railway. The land having been acquired for specific purposes, an injunction is regarded as the proper remedy to secure its quiet enjoyment.[2]

§ 415. The authority of the body granting permission for the construction of a road may be called in question, and it would appear that where such authority has been exceeded the work may be enjoined. Thus, where the common council of a city has exceeded its power in authorizing the construction of a street railway and its operation for an indefinite period of time, the construction of the road may properly be enjoined.[3]

§ 416. Under the authority of equity to interfere for the prevention of irreparable mischief, a railway company may be enjoined from planting trees so close to one's land as to overshadow it and to cause the roots to spring up to the damage of the soil.[4] And where a statute provides that in the construction of levees over private property a just compensation shall be paid to the owners for damages thereby incurred, an injunction may properly issue to stay proceedings until the damages have been ascertained and paid according to law.[5]

§ 417. From the peculiar nature of works of public improvement and the serious injury that may result from any unwarranted interference with their construction, the jurisdic-

[1] Champion v. Sessions, 1 Nev. 478.

[2] Albany etc. v. Brownell, 24 N. Y. 345; Mohawk etc. v. Artcher, 6 Paige, 87.

[3] Milhau v. Sharp, 27 N. Y. 611.

[4] Brock v. Connecticut etc., 35 Vt. 378.

[5] Horton v. Hoyt, 11 Iowa, 496.

tion in restraint of such works is exercised with great caution, keeping constantly in view the damage that may result from improperly restraining their operation. Except in cases of peculiar hardship an injunction should not be granted against the construction of a public work before the coming in of the answer, since the granting of an injunction upon every *ex parte* bill which might be presented would place such works at the mercy of every landed proprietor through whose premises they pass.[1]

§ 418. Where a railway company in its capacity as a common carrier refuses to make a personal delivery of goods to a consignee, the fact that a statutory remedy has been provided will not prevent a court of equity from entertaining jurisdiction of the matter if the statutory remedy is inadequate.[2] And where the course pursued by the carrier is such as to greatly injure if not destroy the business of complainants, and damages at law would afford no just compensation for the injury, an injunction is the proper remedy.[3] Nor will such carrier be allowed to impose upon certain warehousemen additional charges beyond what are imposed upon others, and it may be enjoined from attempting to levy such charges.[4]

[1] Elmslie *v.* Delaware etc., 4 Whart. 424. And see Delaware etc. *v.* Raritan etc., 1 McCart. 445.

[2] Vincent *v.* Chicago etc., 49 Ill. 33.

[3] Id.

[4] Id.

CHAPTER IX.

OF INJUNCTIONS TO STAY WASTE.

I. ORIGIN AND NATURE OF THE JURISDICTION.
II. DESTRUCTION OF TIMBER.
III. EQUITABLE WASTE.
IV. PARTIES.
V. SPECIAL ACTS OF WASTE.

I. ORIGIN AND NATURE OF THE JURISDICTION.

§ 419. The jurisdiction of recent origin; remedy at common law.
420. Distinction between waste and trespass.
421. Complainant must show good title; facts must be alleged.
422. Injunction in aid of the legal right; title must be established at law.
423. Insolvency of defendants in possession.
424. Adverse possession; use of land in ordinary manner not enjoined pending action to try title.
425. Not essential that actual waste should have been committed.

§ 419. The jurisdiction of equity in restraining the commission of waste is of comparatively recent origin and rests upon the necessity of preventing irremediable injury. At common law the mode of proceeding was by writ of prohibition issuing out of the Court of Chancery, which, if ineffectual, was followed by an original writ of attachment from the same source, returnable in the courts of common law. Originally this proceeding was confined to tenants in dower, tenants by curtesy, and guardians in chivalry, though it was afterward extended, by statute, to other persons.[1] The writ of estrepe-

[1] Jefferson v. Bishop of Durham, 1 Bos. & Pull. 120.

ment was also a common law writ, whose purpose was the staying of waste in any action real, after judgment and before possession delivered. Its use, however, did not, at common law, extend to the case of waste committed by the tenant *pendente lite*, and it was not until the statute of Gloucester[1] that its use was enlarged to meet the case of waste pending the suit.[2] The writ of estrepement being confined to actions real, it became necessary, in cases of ejectment, to apply to equity to supply the deficiencies of the common law by restraining waste pending an action of ejectment to try the title, and this would seem to be the origin of the jurisdiction of equity in cases of waste.[3]

§ 420. The distinction between waste and trespass consists in the former being the abuse or the destructive use of property by one who, while not possessed of the absolute title thereto, has yet a right to its legitimate use; trespass being an injury to property by one who has no right whatever to its use.[4] And an injunction issued pending the trial of the title at law in an action of trespass *quare clausum*, is ancillary or auxiliary to the action at law and follows its fortunes. It follows, therefore, that when plaintiff recovers a general judgment in his action at law, the writ will be made perpetual.[5]

§ 421. It may be laid down as a general rule that equity will not restrain waste except upon unquestioned evidence of complainant's title, and where defendant is in possession, under adverse title, the relief will be refused.[6] Nor will an

[1] 6 Edw. I. Ch. 13.

[2] 3 Black. Com. 227, 228.

[3] 2 Story's Eq. § 911, and cases cited; 3 Black. Com. 227, 228.

[4] Hill *v.* Bowie, 1 Bland, 593.

[5] Id.

[6] Pillsworth *v.* Hopton, 6 Ves. 51; Davies *v.* Leo, Ib. 784; Poindexter *v.* Henderson, Walk. Miss. 177; Nevitt *v.* Gillespie, 1 How. Miss. 108. "I do not recollect," says Lord Eldon in Pillsworth *v.* Hopton, "that the court has ever granted an injunction against waste under any such circumstances: the defendant in possession: the tenants having attorned: the plaintiff having failed in his ejectment: both setting up pretenses of title. I remember perfectly being told from the bench very early in my life, that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he

injunction be allowed where it does not appear that the injury will be destructive to the estate of inheritance or productive of irreparable mischief.[1] Nor will mere allegations of irreparable injury suffice, but the facts must be shown which go to constitute the injury alleged to be irreparable.[2] And where the injury complained of is susceptible of perfect pecuniary compensation, and one for which satisfaction in damages can be had at law, the injunction will be withheld.[3] So where the right to the premises is in doubt, pending an action of ejectment at law, the relief will not be granted, on the general principle that where the right is doubtful equity will not interfere.[4]

§ 422. The jurisdiction of equity in cases of waste is not in derogation of the jurisdiction of courts of law, but rather in aid of the legal right. Hence arises the limitation that it will be exercised only when complainant has established or is endeavoring to establish his title at law. And on an application for an injunction, defendant being in exclusive possession, under colorable title, equity will not sustain the legal estate in the absence of proceedings at law to try the title of complainant.[5] And where an injunction has been granted,

stated himself out of court as to the injunction." The reporter adds: "His Lordship having inquired if the bar knew any instance, and none being produced, would not make the order." But see, *contra*, Shubrick v. Guerard, 2 Desaus. Eq. 616, note.

[1] Hamilton v. Ely, 4 Gill, 34; Amelung v. Seekamp, 9 Gill & J. 468.

[2] Bogey v. Shute, 1 Jones Eq. 180.

[3] Cockey v. Carroll, 4 Md. Ch. 344; Amelung v. Seekamp, 9 Gill & J. 468.

[4] Pillsworth v. Hopton, 6 Ves. 51; Field v. Jackson, Dickens, 599; Storm v. Mann, 4 Johns. Ch. 21.

[5] Bogey v. Shute, 4 Jones Eq. 174. In this case an injunction was sought on the ground of the insolvency of the defendant and injury to the substance of the estate by acts in the nature of destructive waste. The court, Ruffin, J., say: "Such a bill can not be sustained against one in exclusive possession—claiming, colorably at least, the absolute estate, until the plaintiff has established his title at law—or, at all events, an injunction can be granted only when the plaintiff is endeavoring to establish his title at law, and until he should have a reasonable time allowed for that purpose. For, the court of equity acts in such cases, not as superseding the jurisdiction of the courts of law over a legal title, but only in aid of a legal remedy, defective, because dilatory."

the title being in dispute, it will be dissolved, no action at law having been undertaken to try the title.[1] Nor will the injunction be retained on the ground that one of the defendants has brought an action of trespass *quare clausum* against complainant to determine the legal title, since that is purely a legal question.[2]

§ 423. But it has been held sufficient to sustain a bill for an injunction to stay waste and prevent the removal of improvements, that the bill alleges that complainant is the owner and entitled to the possession of the premises, with the improvements, and that defendants are in possession and threaten to destroy the improvements, and that they are insolvent and unable to respond in pecuniary damages.[3]

§ 424. Where reliance is had upon adverse possession to warrant the interference, such possession must be accompanied with a positive and exclusive claim of the entire title. And if complainant's title be subordinate to, or admit the existence of a superior title, such possession, regardless of its duration, will not be held adverse, and equity will not interfere.[4] And pending an action of ejectment to try the title, defendant will not be restrained from using the land in the ordinary course of agriculture, and clearing off timber and erecting buildings for that purpose.[5]

§ 425. To warrant the interference it is not essential that actual and serious waste should have been already committed.[6] Though in general equity will only interfere to prevent future waste where complainant is remediless at law, or where a discovery is necessary.[7] And where the waste is trivial equity will not interfere unless an intention to commit further waste be shown.[8] But if it can be shown that an intention exists to

[1] Brown *v.* Folwell, 3 Halst. Ch. 593.
[2] Wright *v.* Grist, 1 Busb. Eq. 203.
[3] Meadow Valley etc. *v.* Dodds, 6 Nev. 261.
[4] Dean *v.* Brown, 23 Md. 11.
[5] Thompson *v.* Williams, 1 Jones Eq. 176.
[6] Gibson *v.* Smith, 2 Atk. 182.
[7] Winship *v.* Pitts, 3 Palge, 259.
[8] Coffin *v.* Coffin, Jac. 71.

commit waste, or that threats of its commission have been made, the court may interfere.[1]

II. Destruction of Timber.

§ 426. When equity may enjoin the cutting and removal of timber.
427. Preliminary steps sufficient ground for interference.
428. Irreparable injury must be shown; injunction not granted as to timber already cut.
429. Injunction not allowed for past injuries, nor where defendants claim both title and possession.
430. Special cases.
431. Tendency to a more liberal use of the writ; but not allowed in case of disputed title.

§ 426. The most frequent class of cases in which the aid of equity is invoked for restraining waste is in the cutting and removal of timber from estates of freehold. Pending an action at law to try disputed titles, the cutting and removal of timber will be enjoined where such timber constitutes the chief value of the land, and where it is shown that defendant would be unable to respond in damages.[2] So where complainant avers title in himself and has brought an action of forcible entry, defendant being in possession of the premises, an injunction may be allowed to prevent defendant from cutting timber.[3] And where both parties claim title, the cutting of timber has been restrained on the principle of bills *quia timet*.[4] Nor is it necessary that there should be an actual *lis pendens* in a court of law, and equity may, in its discretion, enjoin the cutting down and removal of large quantities of timber, where no action is pending.[5]

[1] Gibson v. Smith, 2 Atk. 182; Coffin v. Coffin, Jac. 71.

[2] Kinsler v. Clarke, 2 Hill Ch. 617.

[3] Hicks v. Michael, 15 Cal. 107.

[4] Peak v. Hayden, 3 Bush, 125.

[5] Kane v. Vanderburg, 1 Johns. Ch. 11. Kent, Chancellor, in delivering the opinion, says: "Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of

§ 427. Although defendant denies any intention of cutting timber upon the premises concerning which an injunction is sought, yet if he admits having taken preliminary steps for that purpose, such as sending a surveyor to mark the trees preparatory to cutting them, an injunction will be allowed, since it is not necessary that waste should have been actually committed to warrant a court of equity in interfering.[1]

§ 428. Where an injunction is sought against the cutting of timber, it must appear that the trees have a peculiar value, or are of great importance to the estate, as fruit or ornamental trees, and in the case of timber it must appear that its destruction would result in irreparable loss to the estate.[2] The proper thinning out of trees so as to enhance the value of the remaining timber does not constitute waste.[3] And an injunction will not be allowed against the removal of timber already cut on the premises, since it has ceased to be a part of the realty, but is personal property, for which trover will lie.[4] Nor will defendant who is in possession of land under a contract of purchase be restrained from cutting timber, unless it should be continued to such an extent as to render the land insufficient security for the payment of the purchase money.[5]

§ 429. The province of an injunction being preventive rather than remedial, it will not be used to restrain past

discretion in the court. The tenant for life is here suffering injury to his own interest, and he, by his tenants, is doing great injury to the inheritance, which it is his duty to prevent. He is bound to stop the mischief, or be responsible himself. To suppose that an ejectment must be actually commenced before the injunction can issue is certainly an error. This would be placing the operation of waste beyond the reach of control during the period of the six month's notice." In this case the bill stated that notices to quit had already been served on defendants and that ejectment would be brought. The court held the notice equivalent to the commencement of an adverse proceeding to try the title at law, and sufficient to bring the case within the spirit of the ruling in Lathrop v. Marsh, 5 Ves. 259.

[1] Jackson v. Cator, 5 Ves. 688.

[2] Green v. Keen, 4 Md. 98.

[3] Cowley v. Wellesley, 1 L. R. Eq. 656.

[4] Van Wyck v. Alliger, 6 Barb. 507; Watson v. Hunter, 5 Johns. Ch. 169

[5] Van Wyck v. Alliger, *supra*.

injuries, and where it does not appear that future waste is threatened, the relief will be withheld.[1] And where defendants claim both title and possession, equity will not restrain the cutting of timber, even though it constitutes the chief value of the premises.[2] More especially is this the case where defendants' title has been recognized by complainants.[3] And where the answer fully denies that the cutting of the timber would be an act of irreparable injury, and denies the inability of defendants to respond in pecuniary damages, the injunction will be dissolved.[4]

§ 430. Equity will not stay waste at the suit of one who

[1] Southard v. Morris etc., Saxt. 518; Watson v. Hunter, 5 Johns. Ch. 169. This was a bill filed by the owner of the fee against a tenant for years to restrain the cutting of pine timber on the premises leased and to restrain the removal of that already cut. Kent, Chancellor, after reviewing the English authorities, says: "This court will stay the commission of waste, or the transfer of negotiable paper, in certain cases, in order to prevent irreparable mischief; but the only mischief that can arise in the present case, as to the timber already cut and drawn to the mills of the defendants, is the possible inability of the party to respond in damages. That is a danger equally applicable to all other ordinary demands, and it is not an impending and special mischief, which will justify this extraordinary preventive remedy by injunction. If the injunction could be ordinarily applied to waste already committed, I apprehend we should very rarely hear of a special action on the case, in the nature of waste, in the courts of common law. * * * Where the mischief would be irreparable it might be necessary to interfere in this extraordinary way, and prevent the removal of the timber. I do not mean to be understood to say that the court will never interfere, but that it ought not to be done in ordinary cases like the present. I shall accordingly confine the injunction to the timber standing or growing at the time of the service of process." See also Smith v. Cooke, 3 Atk. 381; Lee v. Alston, 1 Ves. Jr. 78; Garth v. Cotton, 1 Ves. 528; Bishop of London v. Web, 1 P. Wms. 527; Packington v. Packington, 3 Atk. 215.

[2] Shreve v. Black, 3 Green Ch. 177.

[3] Shreve v. Black, 3 Green Ch. 177. Pennington, Chancellor, says: "My embarrassment is not so much about the title as about the possession. When this is claimed by the defendant, as well as the title, and that too in connection with the title, what right has the court to interfere? To enjoin both parties until a trial is had must result in tying up all unimproved lands, about which there is any dispute, from being enjoyed by their owners."

[4] Kerlin v. West, 3 Green Ch. 449.

has failed to recover damages at law after several suits against the parties for trespass in cutting timber on his land.[1] And it would seem that the cutting of such timber as is necessary for repairs and the cultivation of the land will not be enjoined.[2] But a tenant for ninety-nine years, with the privilege of renewal forever, and with leave to purchase the reversion at a stipulated price, will be restrained from cutting young timber which constitutes the chief value of the land.[3] On proof, however, of complainant's want of title, the injunction will be dissolved, notwithstanding the pendency of his action at law for the trespass in cutting timber.[4]

§ 431. Although the tendency of courts of equity is to a more liberal use of the writ of injunction in restraint of waste than was formerly allowed, still a strong case of destruction or irreparable mischief must be made out to warrant the relief. And the cutting of timber upon pine lands, valuable chiefly for the wood, is not such a case of irreparable mischief as to warrant the injunction, where defendant sets up an adverse claim to a part of the land, and the title and real ownership are in doubt.[5] But the cutting of fruit trees growing in a garden or orchard is held to be waste and destructive of the inheritance.[6]

[1] West *v.* Page, 1 Stockt. 119.

[2] Duvall *v.* Waters, 1 Bland, 569.

[3] Thruston *v.* Mustin, 3 Cranch C. C. 335.

[4] Westcott *v.* Gifford, 1 Halst. Ch. 24.

[5] West *v.* Walker, 2 Green Ch. 279, and notes. And see Cornelius *v.* Post, 1 Stockt. 196.

[6] Littler *v.* Thompson, 2 Beav. 129.

III. Equitable Waste.

§ 432. Definition of equitable waste.
433. Ornamental timber; intention of devisor to govern.
434. Nice distinctions as to ornamental timber; question one of fact.
435. Destruction of young timber constitutes equitable waste.
436. Injunction not granted where legal relief is the main object of the action.
437. Trust and contingent estates.

§ 432. Equitable waste is defined to consist of such acts as are not considered waste at law, being consistent with the legal rights of the party committing them, but which are deemed waste in equity on account of their manifest injury to the inheritance.[1] In other words, it is an unconscientious or unreasonable exercise of a legal right, for which the law provides no remedy, and it may exist independent of any malicious intention.[2] The remedy by injunction, being to prevent a known and certain injury, is applicable to every species of waste.[3] And if the tenant for life commits waste maliciously, he will be enjoined even though he had the power to do the acts complained of.[4] So if the tenant for life, even where the lease contains a clause without impeachment of waste, wantonly and maliciously injures or destroys buildings, he will be restrained, though the remainder-man is absolutely remediless at law.[5] And the fact that the power is being exercised in an unreasonable manner and against conscience is sufficient to warrant the interference.[6] So, too,

[1] 2 Story's Eq. § 915.
[2] Turner v. Wright, 2 DeG. F. & J. 234, 245.
[3] Hawley v. Clowes, 2 Johns. Ch. 122.
[4] Abraham v. Bubb, 2 Freem. Chy. 53.
[5] Vane v. Barnard, 1 Salk. 161, 2 Vern. 738; Clement v. Wheeler, 25 N. H. 360; Packington v. Packington, 3 Atk. 215; Strathmore v. Bowes, 2 Bro. C. C. 88.
[6] Aston v. Aston, 1 Ves. 264; Marker v. Marker, 9 Hare, 1.

the assignee of the tenant for life without impeachment of waste, will be restrained.[1]

§ 433. The cutting of timber planted for ornament of the premises seems to come within the definition of equitable waste above given,[2] and tenant in tail, after possibility of issue extinct, will be restrained from such acts of waste.[3] The presumed intention of the devisor governs in determining what trees are to be deemed ornamental, and when this is ascertained the court will extend its protection, whether it regards the trees as ornamental or the contrary.[4] Trees which have been planted or left standing for purposes of protection, as well as those meant to exclude objects from view, are regarded as coming within the rule and will be protected.[5] But the interference is confined to trees of an ornamental nature only, and it will not be extended to those which are planted for profit.[6] And the tenant may thin out ornamental trees without being liable as for waste.[7]

§ 434. Nice distinctions have sometimes been drawn as to what constitutes ornamental timber, the destruction of which will be enjoined. Thus, it has been held that the writ should extend only to timber "standing for ornament and shelter," and not to timber "contributing to ornament."[8] And in interfering for the protection of ornamental timber equity will confine the relief to such timber as has been planted or left standing for ornament, the question in all such cases being purely one of fact, to be determined in accordance with the presumed will and intention of the person by whom the

[1] Clement *v.* Wheeler, 25 N. H. 361.

[2] Downshire *v.* Sandys, 6 Ves. 107; Wombwell *v.* Bellasyse, Ib. 110, note; Burges *v.* Lamb, 16 Ves. 185.

[3] Burges *v.* Lamb, 16 Ves. 185; Day *v.* Merry, 16 Ves. 375.

[4] Wombwell *v.* Bellasyse, 6 Ves. 110, note; Downshire *v.* Sandys, Ib. 107; Mahon *v.* Stanhope, 3 Madd. 523; Marker *v.* Marker, 9 Hare 1.

[5] Aston *v.* Aston, 1 Ves. 265; Tamworth *v.* Ferrers, 6 Ves. 419; Downshire *v.* Sandys, Ib. 107; Day *v.* Merry, 16 Ves. 375.

[6] Halliwell *v.* Philipps, 4 Jur. N. S. 608.

[7] ——— *v.* Copley, 3 Madd. 525, note.

[8] Williams *v.* McNamara, 8 Ves. 70.

power was created, and not according to the opinions of the court.[1]

§ 435. The destruction of young trees unfit for timber is regarded as equitable waste. But the cutting must be shown to be destructive to the estate, and the fact that the tenant for life, without impeachment of waste, is cutting younger trees than a careful and prudent husbandman would do, will not authorize the interference.[2] And the cutting of saplings at unseasonable times is such malicious destruction as equity will enjoin.[3] So, too, the relief has been extended to the cutting of underwood where it is destructive of the estate.[4]

§ 436. We have already seen that equity will restrain the commission of waste by the tenant where the rights of the party aggrieved are merely equitable rights, and where no action at law could be maintained against the tenant.[5] But where complainant has only an equitable and not a legal interest in the land, and his action is brought to recover the land itself and damages for waste committed, an injunction will not be granted, since the object of his action is to secure legal and not equitable relief.[6]

§ 437. It is said that the jurisdiction will be more readily exercised in the case of a trust estate.[7] So equity will interfere to prevent waste to the injury of a contingent estate, or an executory devise, depending upon a legal estate.[8] And an heir, who takes by resulting trust, is within the principle of

[1] Marker *v.* Marker, 9 Hare, 1.

[2] Aston *v.* Aston, 1 Ves. 265; Peirs *v.* Peirs, Ib. 521; Tamworth *v.* Ferrers, 6 Ves. 419; Hole *v.* Thomas, 7 Ves. 589.

[3] Hole *v.* Thomas, 7 Ves. 589.

[4] Id.; Brydges *v.* Stephens, 6 Madd. 279.

[5] See § 432, *ante;* Perrot *v.* Perrot, 3 Atk. 94; Robinson *v.* Litton, Ib. 210; Farrant *v.* Lovel, Ib. 723; Garth *v.* Cotton, 1 Ves. 556.

[6] Gillett *v.* Treganza, 13 Wis. 472. Though it would seem that if the proceedings were addressed by the equitable owner to the equity powers of the court, asking its aid to stay waste, or injuries affecting the freehold, it might be granted by virtue of the general powers of a court of equity. Id.

[7] Robinson *v.* Litton, 3 Atk. 210; Stansfield *v.* Habergham, 10 Ves. 277.

[8] Story's Eq. § 914; Stansfield *v.* Habergham, 10 Ves. 277.

equitable waste until the happening of the contingency.[1] But as between tenants in common, an injunction will not be granted on grounds of purely equitable waste, although the malicious destruction of trees may warrant the interference between such tenants.[2]

IV. Parties.

§ 438. General rule as to parties.
439. Grounds of danger must be shown.
440. Devisee for life; removal of building; under-lessee.
441. Crops.
442. Sub-lessee, when enjoined.
443. Joint tenants, tenants in common and coparceners.
444. Mortgagor in possession may be restrained from committing waste.
445. Principle on which the interference is based.
446. Same rule applicable to mortgages of chattels.
447. Mortgagor who sells equity of redemption can not enjoin waste.

§ 438. While there are many cases where parties committing waste may be restrained by injunction, even though dispunishable at law,[3] yet as a general rule he only who has the remainder or reversion of the inheritance is entitled to the relief, and the jurisdiction will not be exercised in behalf of one whose only evidence of title consists in the unsupported allegations of his bill.[4] But a single, clear instance of waste on the part of a tenant for life is sufficient to sustain and continue an injunction, especially if it be shown to have been intentional and not the result of accident.[5] And a tenant for life will be restrained at the suit of the remainder-man from killing timber preparatory to cultivating the soil, and from cutting wood for sale.[6]

[1] Stansfield *v.* Habergham, 10 Ves. 277.
[2] Hole *v.* Thomas, 7 Ves. 589.
[3] 2 Story's Eq. § 913.
[4] Loudon *v.* Warfield, 5 J. J. Marsh. 196.
[5] Sarles *v.* Sarles, 3 Sandf. Ch. 601.
[6] Dickinson *v.* Jones, 36 Geo. 97.

§ 439. The tenant for life will not be restrained from the removal of personal property unless good ground be shown for apprehending that there is danger of its removal.[1] And the fears and apprehensions of the remainder-man are not sufficient to authorize the injunction, but the facts must be shown which constitute the danger of the removal.[2]

§ 440. A devisee for life may be restrained by the owner in fee from the cutting down of timber other than that necessary for the use and cultivation of the premises.[3] But a landlord, who is not entitled to the reversion, will not be allowed to enjoin the commission of waste by the removal from the premises of a building erected by the tenant,[4] though a ground landlord is entitled to an injunction to restrain an under-lessee from the commission of waste.[5]

§ 441. A tenant from year to year may be enjoined from removing crops, straw and manure, where it is contrary to the custom of the country.[6] And it has been held that the sowing of land with hurtful crops is such waste as equity will restrain.[7]

§ 442. The aid of equity may be properly invoked by the owner of the fee to restrain a sub-lessee from effecting such changes in the premises as are inconsistent with the terms of the lease, and as are likely to result in such injury to the owner's right as is not susceptible of adequate compensation at law.[8] So, too, the lessor may restrain his lessee, or those claiming under him or acting by his authority, from converting the demised premises to uses repugnant to the terms of the lease,[9] and from making material alterations, as by

[1] Clagon v. Veasey, 7 Ired. Eq. 175.
[2] Lehman v. Logan, 7 Ired. Eq. 296.
[3] Smith v. Poyas, 2 Desaus. Eq. 65.
[4] Perrine v. Marsden, 34 Cal. 14.
[5] Farrant v. Lovel, 3 Atk. 723.
[6] Pulteney v. Shelton, 5 Ves. 147; Onslow v. ——, 16 Ves. 173; Pratt v. Brett, 2 Madd. 62.
[7] Pratt v. Brett, *supra*.
[8] Baugher v. Crane, 27 Md. 36.
[9] Steward v. Winters, 4 Sandf. Ch. 587.

changing a building rented for a post office into a beer hall,[1] or a dwelling into a warehouse.[2]

§ 443. As a general rule equity will not interfere to restrain waste as between joint tenants, tenants in common, or coparceners, since their right is equal in the use and enjoyment of the estate.[3] It is otherwise, however, if the defendant be insolvent and incapable of responding in pecuniary damages.[4] And where the waste is destructive to the estate, and not within the usual and legitimate enjoyment of the premises, such as cutting growing timber not necessary to carry on farming operations, the relief will be granted.[5] So, too, if one of the parties occupies as a tenant to the other, equity may interfere.[6] But tenants in common will not be enjoined from cutting timber where insolvency is not averred, and it does not appear that they are exceeding their share of the timber.[7]

§ 444. Again, equity will restrain the commission of waste on behalf of one whose rights are only equitable, and who would be remediless by the strict rules of law. The most frequent instance of the exercise of the jurisdiction in such cases is in restraining waste by the mortgagor in possession of mortgaged premises. The mortgagor in possession, though he may exercise all acts of ownership, even to the extent of committing waste which does not impair the security,[8] will nevertheless be restrained from such acts as depreciate the value of the premises and render the security insufficient.[9]

[1] Maddox *v.* White, 4 Md. 72.

[2] Douglass *v.* Wiggins, 1 Johns. Ch. 435.

[3] Goodwyn *v.* Spray, Dick. 667; Hole *v.* Thomas, 7 Ves. 589.

[4] Smallman *v.* Onions, 3 Bro. C. C. 620.

[5] Hawley *v.* Clowes, 2 Johns. Ch. 122.

[6] Twart *v.* Twart, 16 Ves. 128.

[7] Hihn *v.* Peck, 18 Cal. 640.

[8] Kekewich *v.* Marker, 3 Mac. & G. 329.

[9] Ensign *v.* Colburn, 11 Paige, 503; Gray *v.* Baldwin, 8 Blackf. 164; Bunker *v.* Locke, 15 Wis. 635; Maryland *v.* Northern etc., 18 Md. 198; Brown *v.* Stewart, 1 Md. Ch. 87. In Brown *v.* Stewart it is said that, "It would certainly be falling short of the demands of justice and the exigency of the case if this court, when the remedy is sought exclusively here, (in equity,) has not the power in a proper case to protect the subject of the controversy from destruction while the suit is depending." In King

Especially is this the case where the mortgagor has been declared a bankrupt, and his property has vested in an assignee.[1] And if necessary the injunction will be allowed before the mortgage is due.[2]

§ 445. The principle upon which the interference is based as against a mortgagor in possession is twofold: first, the right of the mortgagee to his whole security unimpaired during the life of the mortgage;[3] and, second, that as between mortgagor and mortgagee the latter is considered in equity as the owner of the fee, and as such entitled to the interference of the court.[4] But the relief will not be withheld even where the mortgagee is not considered the owner of the fee.[5] And where the mortgage is treated merely as a security for the debt, the injunction is allowed to prevent the destruction of the security.[6] So equity will enjoin the commission of waste by the mortgagor in possession even after forfeiture has occurred on his part, and after the right to proceed at law has accrued.[7] But, if adequate damages can be recovered at law for the injury committed, and it is not alleged that defendants are insolvent, relief in equity will be refused.[8]

§ 446. The same principles apply to mortgages of chattels, and equity will interfere to restrain waste committed by the mortgagor in possession after default, since the mortgagee is not bound to take possession of the property by process of

v. Smith, 2 Hare, 244, Wigram, Vice Chancellor, thus defines the term "sufficient security": "I think the question which must be tried is, whether the property the mortgagee takes as as a security is sufficient in this sense —that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into."

[1] Ensign v. Colburn, 11 Paige, 503.

[2] Murdock's Case, 2 Bland, 461; Salmon v. Clagett, 3 Bland, 125.

[3] Nelson etc. v. Pinegar, 30 Ill. 473.

[4] Nelson etc. v. Pinegar, 30 Ill. 473; Robinson v. Litton, 3 Atk. 209.

[5] Brady v. Waldron, 2 Johns. Ch. 148.

[6] Cooper v. Davis, 15 Conn. 561; Murdock's Case, 2 Bland, 461; Salmon v. Clagett, 3 Bland, 125.

[7] Maryland v. Northern etc., 18 Md. 193.

[8] Robinson v. Russell, 24 Cal. 467.

law, but may elect to seek his remedy in equity.[1] And the jurisdiction may be exercised before the mortgagee is entitled to proceed at law for the recovery of his debt.[2]

§ 447. Where complainant, after mortgaging his premises, has sold the equity of redemption without taking security as an indemnity against his bond, he has no interest in the land sufficient to warrant an injunction, nor will it be granted on the ground that the property may be insufficient to satisfy the mortgage, and that he will be held liable for the balance.[3] And where complainant has parted with all his interest, and holds the title merely as security for the payment of the money due him, he stands in the situation of a mortgagee out of possession, and will not be allowed to restrain the cutting of timber unless it is shown that the security is being impaired.[4]

V. Special Acts of Waste.

§ 448. Defendants acting for public benefit will not be enjoined; temporary administrator.
449. Dissolution.
450. Quarrying, when enjoined.
451. No injunction, no account.
452. Exceptions to the rule; mines and collieries.
453. Past waste no ground for the relief; no action at law necessary; attaching creditor.
454. Sale of lands staid by military order.
455. Purchaser under decree; removal of mineral deposits.
456. Coal mines.
457. Especial diligence requisite in case of mines.

§ 448. Where defendants are acting in good faith and for the public benefit, under a charter of incorporation from the state, so long as they do not exceed their corporate powers,

[1] Parsons v. Hughes, 12 Md. 1.
[2] Clagett v. Salmon, 5 Gill & J. 314.
[3] Brumley v. Fanning, 1 Johns. Ch. 501.
[4] Scott v. Wharton, 2 Hen. & M. 25.

they will not be enjoined, even though they are committing great and lasting injury to complainant's estate.[1] Nor will the relief be allowed against a temporary administrator on the ground of the insolvency of his surety, since the remedy at law is ample by compelling the giving of sufficient security.[2]

§ 449. An injunction granted to stay waste pending an action of ejectment at law will be dissolved on denial of complainant's title, especially if he is negligent in trying the title at law.[3] So if the facts do not show privity of title, or irremediable injury, the injunction will be dissolved.[4] And one who has neither privity of estate nor possession, and who has neither established his title at law nor brought ejectment to try the title, is not entitled to an injunction.[5]

§ 450. Where quarrying is the only use that can be made of the premises, it will not be deemed waste if done in a proper manner. And under such circumstances the injunction will not be continued where the answer denies that the quarrying impairs the value of the premises.[6] But where defendant's interest in a quarry and his right to work it have expired with the expiration of his lease, he will be restrained from further quarrying.[7] And the taking of stone by a city corporation from complainant's hill, abutting on the right of way which he had granted to the city for streets, is such waste as equity will restrain.[8]

§ 451. It is a well established principle of equity jurisprudence that in all cases where a bill for an injunction will lie to restrain waste, an account of and satisfaction for the waste already committed will be allowed, to prevent multiplicity of suits as well as to afford complete redress, without compelling

[1] Scudder v. Trenton etc., Saxt. 694.
[2] Montgomery v. Walker, 36 Geo. 515.
[3] Higgins v. Woodward, Hopk. 342.
[4] Georges etc. v. Detmold, 1 Md. Ch. 371.
[5] Blackwood v. Van Vleet, 11 Mich. 252.
[6] Vervalen v. Older, 4 Halst. Ch. 98.
[7] Ackerman v. Hartley, 4 Halst. Ch. 476.
[8] Smith v. City of Rome, 19 Geo. 89. But in this case the court would seem to have gone beyond the authority of the adjudicated cases in saying that "an injunction to stay waste has become almost a matter of course."

a resort to law.[1] Indeed, this would seem to be but the exercise of the ordinary prerogative of equity, that when one resorts to a court of equity for one purpose, his case will be retained until the entire matter is disposed of.[2] And an account for waste committed is considered as a necessary incident of the relief against future waste.[3] And an injunction being refused, as a general rule no account will be allowed for waste already committed.[4]

§ 452. If, however, the waste is of such a nature that the party aggrieved is remediless at law, and would sustain great injury by withholding an account, it will be granted, even though an injunction will not be allowed.[5] And in the case of equitable waste committed by one deceased, an account will be allowed against his assets where an injunction would not be appropriate.[6] In cases of mines and collieries the account may be allowed regardless of whether an injunction will lie.[7] And a tenant in common of a mine is entitled to an account of the profits.[8] So, too, where there are joint owners of land, one who derives profit from waste committed thereon will be required to account to the other owner.[9] But the same laches

[1] Jesus College *v.* Bloom, 3 Atk. 262; Ackerman *v.* Hartley, 4 Halst. Ch. 476.

[2] Jesus College *v.* Bloom, 3 Atk. 262.

[3] Ackerman *v.* Hartley, 4 Halst. Ch. 476.

[4] Crockett *v.* Crockett, 2 Ohio St. 180, affirming the maxim, "no injunction, no account," announced by Lord Brougham in Parrott *v.* Palmer, 3 Myl. & K. 632.

[5] Garth *v.* Cotton, 3 Atk. 751; Parrott *v.* Palmer, 3 Myl. & K. 632.

[6] Lansdowne *v.* Lansdowne, 1 Madd. 116; Morris *v.* Morris, 3 DeG. & J. 323.

[7] Winchester *v.* Knight, 1 P. Wms. 406; Story *v.* Windsor, 2 Atk. 630; Pulteney *v.* Warren, 6 Ves. 89. And in Parrott *v.* Palmer, 3 Myl. & K. 632, Lord Brougham, after reviewing the English cases, observes: "From the whole it may be collected that although, as to timber, there exists considerable discrepancy, yet the sound rule is to make the account the incident and not the principal, where there is a remedy at law; but that mines are to be otherwise considered, and that, as to them, the party may have an account even in cases where no injunction would lie."

[8] Bently *v.* Bates, 4 Y. & C. 182.

[9] Martyn *v.* Knowllys, 8 T. R. 145.

which will disentitle complainant to relief by injunction may prevent his obtaining an account, even in cases of mines.[1]

§ 453. Where there is no claim of right to commit acts amounting to waste, and no intention to commit such acts, an injunction should not be granted merely because the tenant in possession had, at some previous time, committed waste.[2] Though the jurisdiction was originally confined to cases where it was sought to restrain waste *pendente lite*, it has long since been extended to cases where no action at law is pending.[3] And an attaching creditor is entitled to the relief for the protection of the estate which he has attached to satisfy his debt, the jurisdiction resting, as we have already seen in the case of mortgages, upon the necessity of preventing the security from being diminished or impaired.[4] But he who seeks the aid of

[1] Parrott *v.* Palmer, 3 Myl. & K. 632.

[2] Crockett *v.* Crockett, 2 Ohio St. 180.

[3] Denny *v.* Brunson, 29 Pa. St. 382. And in this case it is held that where the authority of the court to issue injunctions is derived from a statute extending its jurisdiction to the prevention or restraining of "acts contrary to law and prejudicial to the interests of the community, or the rights of individuals," the court may enjoin the commission of waste.

[4] Camp *v.* Bates, 11 Conn. 51. In this case defendant being otherwise insolvent, complainant attached his real estate to secure an indebtedness upon a promissory note. Williams, Ch. J., says: "The case in principle seems much like that of a mortgage. In both cases the land is appropriated as security for the debt. In both cases the creditor has the right to take the land, or resort to other property if it can be found. In both cases the debtor may remove the lien by payment of the debt. In both cases the debtor may deny or disprove the existence of the debt. Why, then, should not a court of chancery have the same power to prevent waste upon this property in the one case as well as the other? If it is done in the one case, that the security given by the party should not be destroyed, it should be done in the other, that the security given by the law should not be destroyed. Surely the law must be as anxious to guard its own enactments, as the provisions of the parties themselves." Referring to the objection that complainant was not entitled to the injunction since he was not in possession of the property, the court further say: "Here, from the nature of the case, no actual possession of the property could be obtained by the creditor. But the writ of attachment gave to the creditor the statute privilege, and all the possession that the nature of the case admitted. The property is left in the possession of the debtor just as in the case of a mortgage; but it is, in view of the law, in the custody of the law

equity for the prevention of waste should use due diligence in making the application.[1]

§ 454. Where the sale of lands levied upon under execution has been staid by military order, and waste is being committed, it is competent for a court of equity to interfere for the prevention of the waste.[2] And in such case the fact that, pending the proceedings for the injunction, the military order ceases to have effect, does not impair the jurisdiction of equity by injunction.[3]

§ 455. A purchaser of real estate under a decree, who has not paid the purchase money, may be enjoined from committing waste, although not a party to the proceedings in which the decree was rendered.[4] And a tenant of a farm on which is a pool fed by a mountain stream depositing in the pool mineral substances of value, may be restrained from removing or disturbing such deposits, complainant's right to the mineral substances having been established by a verdict at law in an action against the same defendant.[5]

§ 456. The tenant for life of premises containing coal mines which he has leased to defendant, will not be allowed to join with the remainder-man in a bill to restrain defendant from taking coal from the mines, although it is alleged in the bill that the lease was made through mistake and worked a forfeiture of the life estate, the relief being withheld on the principle that equity will not permit a lessor to disaffirm his own lease.[6]

§ 457. While diligence in the assertion of his rights is indispensable on the part of one who seeks the aid of equity for the prevention of waste, the utmost degree of promptitude is exacted in cases of waste in mines, owing to the peculiar

itself; and being so, the law must protect those who are reposing upon its care."

[1] Barry v. Barry, 1 Jac. & W. 651.

[2] Webb v. Boyle, 63 N. C. 271.

[3] Id.

[4] Casamajor v. Strode, 1 Sim. & Stu. 381.

[5] Thomas v. Jones, 1 Y. & C. 510.

[6] Wentworth v. Turner, 3 Ves. 4.

nature of the property.[1] And where complainant, who seeks relief against the commission of waste in the use of mines on premises demised by him, has stood by for many years and allowed defendants to expend large sums of money in developing the mines, without objection, he will not be allowed an injunction.[2]

[1] Norway *v.* Rowe, 19 Ves. 159; Parrott *v.* Palmer, 3 Myl. & K. 632.

[2] Parrott *v.* Palmer, 3 Myl. & K. 632. "If there be anything well established in this court," says Lord Brougham in this case, "it is that a man who lies by, while he sees another person expend his capital and bestow his labor upon any work, without giving to that person notice, or attempting to interrupt him—one who thus acquiesces in proceedings inconsistent with his own claims—when he comes to enforce those claims in this court, shall in vain ask for its interposition by an injunction, of which the effect would be to render all the expense useless, which he voluntarily suffered to be incurred. Here more years have been allowed to elapse than the number of weeks which would have closed the doors against the plaintiff coming to seek an injunction."

CHAPTER X.

OF INJUNCTIONS AGAINST TRESPASS.

I. General Features of the Jurisdiction.
II. Cutting Timber.
III. Trespass to Mines.
IV. Special Acts of Trespass.

I. General Features of the Jurisdiction.

§ 458. Origin of the jurisdiction; possession and title.
459. General rule; exceptions.
460. Two conditions necessary.
461. Requisites of the bill.
462. Distinction as to articles of use and of luxury.

§ 458. The granting of injunctions against the commission of trespass seems to have grown out of the jurisdiction in cases of waste, to which the relief was formerly confined. Privity of title being the essential ground of the interference in restraint of waste, it was not until a very recent period that the rule was relaxed to admit of the relief against a naked trespass, unaccompanied with privity of title.[1] Where the party aggrieved is out of possession, equity will only interfere

[1] Moore v. Ferrell, 1 Geo. 7. The earliest case is known as Flamang's Case, cited in 6 Ves. 147, 7 Ves. 308, and 8 Ves. 90, in which Lord Thurlow granted the relief with reluctance against a trespasser who was working into minerals on complainant's close and thus impairing the substance of the estate. The relief was based solely upon the irreparable injury that would result from a continuation of the trespass. The same principle was afterward recognized and followed by Lord Eldon. See Mitchell v. Dors, 6 Ves. 147.

on the ground of fraud or collusion, or that the trespass threatened would be destructive of the estate.[1] And if the title be denied or in doubt, the injunction will generally be refused against a defendant in possession, until the title is established at law.[2] Though in a strong case of irreparable mischief the rule has been departed from.[3] And where the party aggrieved is in possession he will be allowed to restrain such trespasses as would result in irreparable damage in the event of refusing the relief.[4]

§ 459. The general principle underlying all the authorities upon the subject of injunction against trespass is, that where the remedy at law is ample, equity will not interfere.[5] An exception, however, is recognized where the equitable owner of the property injured is under some disability which would prevent the enforcement of the legal remedy, as where

[1] Neale v. Cripps, 4 Kay & J. 108; Fingal v. Blake, 2 Mol. 50, 542; Lloyd v. Trimleston, Ib. 81.

[2] Perry v. Parker, 1 Woodb. & M. 280; Hart v. Mayor etc., 8 Paige, 213; Chesapeake etc. v. Young, 8 Md. 480.

[3] Burnley v. Cook, 13 Tex. 586. And it has been held, though upon what grounds it is difficult to conjecture consistently with the general rule as stated in the text, that the denial of complainant's title by the answer will not suffice to dissolve the injunction. Moore v. Ferrell, 1 Geo. 7.

[4] Lowndes v. Bettle, 33 L. J. Ch. 451. In this case complainant and his ancestors had been in possession during a period of eighty years, and defendant, who claimed as heir at law, sought to enter and exercise acts of ownership by cutting sods and timber. The injunction was granted upon the principle stated in the text. The distinctions resting upon the question of possession are very clearly set forth by Kindersley, Vice Chancellor, as follows: "Where, therefore, the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under color of right, the tendency of the court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction of the estate, the court will grant it. But where the party in possession seeks to restrain one who claims by adverse title, there the tendency will be to grant the injunction, at least where the acts done either did or might tend to the destruction of the estate." And see Hart v. Mayor etc., 3 Paige, 213.

[5] Cooper v. Hamilton, 8 Blackf. 377; Smith v. Smith, 4 Jones Eq. 303; Gause v. Perkins, 3 Jones Eq. 177; Stevens v. Beekman, 1 Johns. Ch. 318.

property is bequeathed to a *feme covert* as her separate estate, without the intervention of a trustee, the legal estate thereby vesting in the husband. In such case equity will restrain the sale of the property under execution against the husband.[1] The necessity of preventing a multiplicity of suits affords another exception to the rule, and will warrant the interposition of the strong arm of equity, even though there be a remedy at law.[2] But to warrant the interference in such cases there must be different persons assailing the same right, and the principles upon which the relief is granted have no application to a repetition of the same trespass by one and the same person, the case being susceptible of compensation in damages.[3]

§ 460. To warrant the interference of equity in restraint of trespass, two conditions must co-exist: first, complainant's title must be established by legal adjudication; and, second, the injury complained of must be irreparable in its nature.[4] And to come within the rule the injury must be of such a nature as not to be susceptible of adequate pecuniary compensation in damages.[5] Nor will equity interfere to restrain a trespasser simply because he is a trespasser, but only because the injury threatened is ruinous to the property in the manner in which it has been enjoyed and will permanently impair its future enjoyment.[6] And if the title to the *locus in quo* is in doubt, the injunction, if allowed at all, should only be temporary until the title can be determined at law.[7]

§ 461. It is not sufficient that the bill contains mere general averments of irreparable mischief, but the facts consti-

[1] Smith *v.* Smith, 4 Jones Eq. 303.

[2] Coit *v.* Horn, 1 Sandf. Ch. 1; Hatcher *v.* Hampton, 7 Geo. 50; Nutbrown *v.* Thornton, 10 Ves. 159.

[3] Hatcher *v.* Hampton, 7 Geo. 50.

[4] Gause *v.* Perkins, 3 Jones Eq. 177; Schurmeier *v.* St. Paul etc., 8 Minn. 113.

[5] Weigel *v.* Walsh, 45 Mo. 560; Bethune *v.* Wilkins, 8 Geo. 118; Vanwinkle *v.* Curtis, 2 Green Ch. 422; Shipley *v.* Ritter, 7 Md. 408; Foster, *ex parte*, 11 Ark. 304; Ross *v.* Page, 6 Ohio, 166.

[6] Echelkamp *v.* Schrader, 45 Mo. 505; Mayor etc. *v.* Grosbon, 30 Md. 436.

[7] Id.

tuting such mischief should be set forth.[1] And in the absence of any allegations that the trespass is a continuing one, or is likely to be continued, the injunction will be withheld.[2] It is a sufficient setting forth of complainant's title if he alleges himself to be the owner in fee simple by purchase and to be in possession.[3]

§ 462. A distinction has been taken between trespasses consisting in the removal of such articles from one's premises as are necessary to their enjoyment, and such as are merely articles of convenience or luxury; and while in the former case the injury would prove irreparable, and the injunction is therefore granted,[4] in the latter, the articles being merely articles of convenience, ample remedy can be had at law for their removal, and equity will not interfere.[5] So where defendant threatens to tear down and remove a portion of complainant's dwelling, which he alleges is built on his own land, the injury is so irreparable as to warrant an injunction.[6]

II. Cutting Timber.

§ 463. A strong case of destruction or of irreparable mischief must be made out.
464. Cutting of all the wood on premises may be enjoined.
465. Rule as to timber already cut.
466. Possession coupled with title.
467. Fruit trees and ornamental shrubbery; insolvency; value of property.

§ 463. Though the modern doctrine of courts of equity in restraining trespass is, as we have seen, more liberal than the ancient, yet a strong case of destruction or irreparable mischief

[1] White v. Flannigain, 1 Md. 525; Waldron v. Marsh, 5 Cal. 119; Carlisle v. Stevenson, 3 Md. Ch. 499.
[2] Coker v. Simpson, 7 Cal. 340.
[3] Vanwinkle v. Curtis, 2 Green Ch. 422.
[4] Witmer's Appeal, 45 Pa. St. 455.
[5] Clark's Appeal, 62 Pa. St. 447.
[6] DeVeney v. Gallagher, 5 C. E. Green, 83.

must be made out, since courts of law are, in general, the proper forum for disposing of actions of trespass. And the fact that the title to the premises is disputed, as between the devisee and an heir at law, constitutes an effectual bar to the granting of an injunction against the cutting of timber.[1] Even the cutting and removal of timber from pine lands, valuable chiefly for the timber, is not such a case of irreparable injury as will warrant an injunction, where defendant claims part of the land by adverse title, and the real ownership is in doubt.[2] And where a statute gives ample remedy in addition to that at common law, equity will not restrain the cutting and removal of timber, where it does not appear that defendants are insolvent.[3] So, too, if the allegations of the bill are vague and general as to the threatened removal of the timber, and are made upon belief, the court will not interpose.[4] Nor will mere threats of defendant to cut wood on complainant's land suffice to perpetuate an injunction already granted.[5] And it has been held that the working of turpentine trees and cutting timber for staves, the land being valuable only for this purpose, will not warrant the relief in the absence of any allegation of defendant's insolvency, since the remedy at law is ample.[6]

§ 464. But the destruction of all the timber on complainant's premises, where wood and timber are needed for the enjoyment of the property, will be enjoined, even though damages might be had at law, on the ground that the owner is thereby deprived of the use of his property in the manner in which he has been accustomed to enjoy it.[7] Nor will the relief be withheld because the bill omits to charge the injury as irreparable, provided sufficient facts are alleged to satisfy the court that such would be the case.[8] And the destruction of forest trees is such an irreparable injury as will authorize

[1] Smith v. Collyer, 8 Ves. 89.
[2] West v. Walker, 2 Green Ch. 279.
[3] Cowles v. Shaw, 2 Iowa, 496.
[4] Cornelius v. Post, 1 Stockt. 196.
[5] Woods v. Kirkland, 2 La. An. 337.
[6] Gause v. Perkins, 3 Jones Eq. 177.
[7] Davis v. Reed, 14 Md. 152.
[8] Id.

the interference.[1] Though if complainant is in possession, with adequate remedy at law for the cutting of his timber, equity will not interfere.[2]

§ 465. The disposition of timber, already cut at the time of obtaining the injunction, may be taken into consideration by the court in granting the relief. Thus, it is held that the patentee of public lands, while he may restrain the future cutting of timber upon his premises, will not be allowed to enjoin the removal of timber which had been cut before he obtained his patent.[3]

§ 466. While equity will not restrain the commission of a trespass upon realty unless the right be clear and the mischief irreparable,[4] yet where there has been a long and undisturbed possession of the premises under title deducible of record, such possession, coupled with unquestioned evidence of title, will authorize the relief as against a mere trespasser without color of right.[5]

[1] De la Croix v. Villere, 11 La. An. 39.

[2] Stevens v. Beekman, 1 Johns. Ch. 318. This was a bill to restrain defendants from cutting timber, their only claim of title being from the plaintiff in an action of ejectment pending and undetermined. Kent, Chancellor, held as follows: "This is a case of an ordinary trespass upon land and cutting down the timber. The plaintiff is in possession and has adequate and complete remedy at law. This is not a case of the usual application of jurisdiction by injunction; and if the precedent were once set, it would lead to a revolution in practice; for trespasses of this kind are daily and hourly occurring. I doubt exceedingly whether this extension of the ordinary jurisdiction of the court would be productive of public convenience. Such cases are generally of local cognizance, and drawing them into this court would be very expensive and otherwise inconvenient. Lord Eldon said that there was no instance of an injunction in trespass until a case before Lord Thurlow, relative to a mine, and which was a case approaching very nearly to waste, and where there was no dispute about the right. Lord Thurlow had great difficulty as to injunctions for trespass; and, though Lord Eldon thought it surprising that the jurisdiction by injunction was taken so freely in waste and not in trespass, yet he proceeded with the utmost caution and diffidence, and only allowed the writ in solitary cases of a special nature, and where irreparable damage might be the consequence if the act continued."

[3] Peck v. Brown, 5 Nev. 81.

[4] Gause v. Perkins, 3 Jones Eq. 177; Schurmeier v. St. Paul etc., 8 Minn. 118

[5] Falls etc. v. Tibbetts, 31 Conn. 165.

§ 467. The destruction of fruit trees and ornamental shrubbery is an injury to the realty so irreparable in its nature that equity will interfere.[1] Nor does it make any difference whether the trees were planted by the owner for shade or ornament, or whether they were so situated naturally as to serve this purpose.[2] And it is not necessary in a bill filed to restrain trespass to the realty to allege absolute insolvency of the defendant, but it will suffice that such facts appear as show that a judgment for damages would be entirely worthless.[3] And the jurisdiction of the court in this class of cases does not depend upon the value of the property destroyed, but on the question whether its destruction would materially impair the enjoyment of the property as held and occupied at the time of the commission of the trespass.[4]

III. Trespass to Mines.

§ 468. Greater latitude in cases of mines.
469. Complainant's title; removal of ore; expenditures by defendant.
470. Title must be established at law.
471. Flowing of refuse matter may be enjoined; when perpetual injunction should be awarded.
472. Working through into another's mine; digging ore on public land.

§ 468. In the case of trespass to mining property greater latitude is allowed courts of equity than in restraining ordinary trespasses to realty, since the injury goes to the immediate destruction of the minerals which constitute the chief value of this species of property. Where, therefore, the trespass consists in the removal of ore from complainants' mines, the legal title being clearly established in complainants, they are entitled to

[1] Daubenspeck v. Grear, 18 Cal. 443.
[2] Shipley v. Ritter, 7 Md. 408.
[3] Hicks v. Compton, 18 Cal. 206.
[4] Shipley v. Ritter, 7 Md. 408.

an injunction, even though an action at law would lie.[1] And although the jurisdiction of the court over the parties is put in issue by plea, if the bill contains sufficient averments of jurisdiction, the court may award a temporary injunction to stay the mischief until the question raised by the plea can be determined.[2]

§ 469. While the general rule requiring complainant to show a good title extends to trespass against mines, yet it may be relaxed somewhat in a case of irreparable mischief, where the injury goes to the destruction of the very substance of the estate.[3] And in such a case the injunction will not be limited to the prevention of future trespass, but will restrain the removal of ore already extracted from the mine.[4] If, however, defendants have been in possession for a considerable time, and have expended large sums of money in developing the mine, the injunction will not be allowed except upon a very strong showing.[5] Nor will defendants be enjoined from an alleged

[1] Merced etc. v. Fremont, 7 Cal. 317; Anderson v. Harvey, 10 Grat. 386. This was a bill for an injunction to restrain the removal of ore from complainant's mines. Daniel, J., pronouncing the opinion of the court, says: "The practice of courts of equity of interfering in such cases by way of injunction, is one comparatively of recent origin; but the jurisdiction is now fully recognized and well established by cases both in England and America. Mitchell v. Dors, 6 Ves. R. 147; Hanson v. Gardiner, 7 Ves. R. 305; Thomas v. Oakley, 18 Ves. R. 184; 3 Daniel's Ch. Pr. 1631-2; Stevens v. Beekman, 1 John. Ch. R. 318; Jerome v. Ross, 7 John. Ch. R. 315; Smith v. Pettingill, 15 Verm. R. 84. The land upon which the trespass is alleged to be committed is proved to be of little or no value except for the iron ore found on it, which is proved to be of an excellent quality. The trespass is one which goes to the change of the very substance of the inheritance, to the destruction of all that gives value to it. The fact proved by the appellant that the value of the ore per load could be readily estimated, does not deprive a court of equity of its right to interfere in the case by way of injunction. The same might be shown in most cases of the kind. The products of most mines have a value already fixed or easy of ascertainment by proof; yet it was in prevention of like trespasses to this very species of property, mines of ore, coal, etc., that the jurisdiction in question had its origin and still continues to be most frequently exercised."

[2] Fremont v. Merced etc., McAl. C. C. 267.

[3] United States v. Parrott, McAl. C. C. 271, and cases cited.

[4] Id.

[5] Real etc. v. Pond etc., 23 Cal. 82.

trespass, resulting from their preparations for mining coal, in which complainant has allowed them to proceed for two years, and to expend considerable sums of money, without objection.[1]

§ 470. The jurisdiction in restraint of trespass to mines is not an original jurisdiction of equity, under which the court would be justified in trying the title to the mines themselves, and the party aggrieved must therefore first establish his title at law, or show satisfactory reason for not doing so.[2] It is not necessary, however, that the owner should have actually established his title by an action at law, and if he makes out a good *prima facie* title, which is not controverted by defendant, and shows that those under whom he claims have been in possession and use of the mine for a long period of years, he is entitled to an injunction to prevent such depredations upon his mine as are likely to result in irreparable injury.[3]

§ 471. The jurisdiction is not confined to restraining the removal of ore, but equity will interfere in behalf of prior occupants of mining claims, to restrain the flowing of refuse matter over their claims by adjoining owners.[4] And if the answer admits the entry and working of complainant's mine, but denies his title, upon satisfactory proof of his title a perpetual injunction should be awarded.[5]

§ 472. Where one in digging coal upon his own premises has worked through into the ground of another, he may be enjoined from proceeding farther.[6] And the digging of lead ore from the public lands of the United States, is such a trespass as will warrant the interference of equity in behalf of the government.[7]

[1] Birmingham etc. *v.* Lloyd, 18 Ves. 515.

[2] Irwin *v.* Davidson, 3 Ired. Eq. 311.

[3] West Point etc. *v.* Reymert, 45 N. Y. 703.

[4] Logan *v.* Driscoll, 19 Cal. 623.

[5] McLaughlin *v.* Kelly, 22 Cal. 211.

[6] Mitchell *v.* Dors, 6 Ves. 147. Says Lord Eldon: "That is trespass, not waste. But I will grant the injunction upon the authority of a case before Lord Thurlow; a person, landlord of two closes, had let one to a tenant, who took coal out of that close, and also out of the other, which was not demised; and the difficulty was, whether the injunction should go as to both; and it was ordered as to both."

[7] United States *v.* Gear, 3 How. 121.

IV. Special Acts of Trespass.

§ 473. Possession; multiplicity of suits.
474. Removal of asphaltum; landing of passengers; dissolution.
475. Insolvency; continued act.
476. Of fences, ditches, etc.
477. Distinction between structures before and after completion.
478. Mandatory injunctions, when allowed in cases of trespass.
479. Effect of covenants in lease; limited right of quarrying.
480. Trespass against harbor rights.
481. Trespass upon a common.
482. Injunctions not allowed to restrain forcible entry and detainer.
483. No injunction allowed where remedy at law is ample.
484. Trespass to church property.

§ 473. Equity will not restrain interference with complainant's possession of his premises when the indirect effect of the injunction would be to reinstate complainant in possession, the remedy at law being ample.[1] But a trespass which, from its long continuance, has grown into a nuisance, may be enjoined to prevent multiplicity of suits.[2]

§ 474. The removal of asphaltum from complainant's land, thus depriving him of a part of his inheritance, which can not be replaced, affords ground for an injunction.[3] But the landing of passengers from a steamboat at complainant's dock does not constitute an injury so irreparable as to call for relief in equity.[4] And an injunction granted against waste will be regarded as a mere injunction against trespass, on answer showing no privity of title, and the equity of the bill being denied, a dissolution follows as of course.[5]

§ 475. Insolvency of the trespasser affords additional ground for the interference, since his inability to respond in

[1] Akrill v. Selden, 1 Barb. 316.
[2] Mitchell v. Dors, 6 Ves. 147; Hanson v. Gardiner, 7 Ves. 305.
[3] More v. Massini, 32 Cal. 590.
[4] New York etc. v. Fitch, 1 Paige, 97.
[5] Stewart v. Chew, 3 Bland, 440.

damages renders the remedy at law ineffectual.[1] And an act which, in itself, might not result in serious damage, may, from its continuance, constitute a trespass, resulting in irreparable injury.[2]

§ 476. The erection of a wooden fence on part of complainant's premises is not productive of such serious consequences as to warrant an injunction.[3] Nor will the court interfere where the act complained of consists in permitting a ditch to remain out of repair, whereby water percolates through the bank and floods complainant's meadow, since ample remedy can be had at law.[4] And upon the same principle the throwing up of mud and earth on complainant's land will not be enjoined.[5]

§ 477. Where the trespass complained of consists in the erection of buildings upon complainant's land, a distinction is taken between the buildings when in an incomplete and when in a finished state. And while the jurisdiction is freely exercised before the completion of the structures,[6] yet if they have been completed the relief will generally be withheld, and the person aggrieved will be left to his remedy by ejectment.[7] But if the conduct of defendants in the construction of the obnoxious works has been fraudulent and oppressive, causing serious injury to complainants and preventing their enjoyment of their property in its original condition, equity may interpose.[8]

§ 478. Though the jurisdiction of equity by mandatory injunction to compel the restoration of matters *in statu quo* is sparingly exercised, since, if the trespass consists in the erection of structures, the remedy by ejectment is plain,[9] yet

[1] Musselman *v.* Marquis, 1 Bush. 463.
[2] Hopkins *v.* Caddick, 18 L. T. 236.
[3] Herr *v.* Bierbower, 3 Md. Ch. 456.
[4] Carlisle *v.* Stevenson, 3 Md. Ch. 499.
[5] Mulvany *v.* Kennedy, 26 Pa. St. 44.
[6] Farrow *v.* Vansittart, 1 Rail. C. 602.
[7] Deere *v.* Guest, 1 Myl. & Cr. 516; Moreland *v.* Richardson, 22 Beav. 604.
[8] Powell *v.* Aiken, 4 Kay & J. 343; Bowser *v.* Maclean, 2 De Gex, F. & J. 415.
[9] Deere *v.* Guest, 1 Myl. & Cr. 516; Moreland *v.* Richardson, 22 Beav. 604.

a trespass irreparable in its character and of a continuing nature, may be restrained by a mandatory injunction, thus restoring things to their original condition.[1] Thus, health officers have been restrained by mandatory injunction from allowing a sewer to remain open.[2] And the manager of a business has been enjoined from excluding the owner of the business from the premises.[3] So, too, a mandatory injunction has been granted to prevent defendant from allowing a building to remain on the roof of complainant's house which he had erected there.[4] But the relief will not be allowed to compel the rebuilding of a wall which has been overthrown, the remedy being deemed ample at law.[5]

§ 479. A lease containing covenants to repair, and at the end of the term to surrender the buildings in good condition, constitutes no bar to an injunction against pulling down the buildings and removing the materials immediately before the expiration of the term.[6] And an injunction and account will be allowed against a trespass consisting in defendant's exceeding a limited right which he holds of taking stone from complainant's quarry, such a trespass being regarded as one which goes to the destruction of the inheritance.[7]

§ 480. A foreign corporation may be restrained from taking possession of the land under water in a harbor over which a state has jurisdiction, and from erecting piers and docks thereon, the injury being such as to warrant a court of equity in interfering on behalf of the people.[8]

§ 481. Where one's interest in a common has become extinguished, he will not be allowed to become a trespasser

[1] Martyr *v.* Lawrence, 2 DeGex, J. & S. 261; Robinson *v.* Byron, 1 Bro. C. C. 588; Great etc. *v.* Clarence etc., 1 Coll. 507; Powell *v.* Aiken, 4 Kay & J. 343.

[2] Manchester etc. *v.* Worksop etc., 23 Beav. 209.

[3] Eachus *v.* Moss, 14 W. R. 327.

[4] Martyr *v.* Lawrence, 3 De Gex, J. & S. 261.

[5] Doran *v.* Carroll, 11 Ir. Ch. 379.

[6] Mayor etc. *v.* Hedger, 18 Ves. 355.

[7] Thomas *v.* Oakley, 18 Ves. 184.

[8] People etc. *v.* Central R. R. 48 Barb. 478.

upon the rights of others in the common, and an injunction may issue to prevent him from so doing.[1]

§ 482. An injunction being a preventive remedy, and not used to compel the undoing of what has already been done, it will not be granted in a simple case of trespass by forcible entry and detainer, the remedy at law being regarded as fully adequate to such a case.[2]

§ 483. Equity will not depart from the well-settled rule of leaving the parties to their remedy at law for acts of trespass committed on lands, unless there are some special circumstances set up in the bill, and where it is not shown that the remedy at law is inadequate.[3] And the erection of a trestle work of a railway in a public street is not such a trespass as will authorize an injunction, where the erection is capable of being readily removed.[4] So the taking of stone from a ledge on complainant's premises, being susceptible of pecuniary compensation, and not being shown to be destructive of the estate, will not be enjoined.[5]

§ 484. Trustees of a church may enjoin pretended trustees

[1] Bell *v.* Ohio etc., 25 Pa. St., 161.

[2] Wangelin *v.* Goe, 50 Ill. 459.

[3] Wilson *v.* Hughell, Morris, Iowa, 461.

[4] Schurmeier *v.* St. Paul etc., 8 Minn. 113.

[5] Jerome *v.* Ross, 7 Johns. Ch., 315. In this case canal commissioners being authorized by statute to enter upon any lands contiguous to the canals, and to dig for stone and other materials necessary for the prosecution of their work, dug up and removed stone from a ledge of rock on complainant's premises, who thereupon filed a bill for an injunction. Kent, Chancellor, in finally disposing of the case, says: "The objection to the injunction, in cases of private trespass, except under very special circumstances, is, that it would be productive of public inconvenience, by drawing cases of ordinary trespass within the cognizance of equity, and by calling forth, upon all occasions, its power to punish by attachment, fine and imprisonment, for a further commission of trespass, instead of the more gentle common law remedy by action and the assessment of damages by a jury. In ordinary cases this latter remedy has been found amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass, which go to the destruction of the inheritance, or where the mischief is remediless."

from intermeddling with the church property where the trespass goes to the destruction of the property in the character in which it was enjoyed.[1] And upon satisfactorily establishing the legal right and its violation, a perpetual injunction will generally be awarded against a trespass.[2]

[1] Trustees etc. *v.* Hoessli, 13 Wis. 348. Complainants, being trustees of an incorporated religious society, asked a perpetual injunction against certain parties pretending to be trustees to restrain them from intermeddling with the church property. It was held on demurrer that the action was properly brought by the trustees in their official capacity and not in the name of the state; also that a sufficient cause of action was shown to warrant the interference of a court of equity. Cole, J., observes: "The general rule undoubtedly is, that in cases of private trespass an injunction would not be granted, for the reason that the aggrieved party has an adequate common-law remedy by action where proper damages could be assessed by a jury. In ordinary cases this was found to be sufficient for the protection of property. 'But in cases of a peculiar nature, where the mischief was irremediable, which damages could not compensate, or where the injury reached to the very substance and value of the estate, and went to the destruction of it in the character in which it was enjoyed,' then courts of equity would grant an injunction to prevent the injury complained of. Beatty *v.* Kurtz, 2 Peters, 566, Jerome *v.* Ross, 7 Johns Ch. 315, Varick *v.* Mayor, etc., 4 Ib. 53. Now it must be admitted that the circumstances of this case are so special, the nature and use of the property itself are so peculiar, that an ordinary action of trespass would furnish no adequate compensation for an injury to the possession. For would any mere pecuniary damages furnish any compensation to a religious society for repeated and constant acts of trespass upon its property and temporalities? Most clearly not. The entire value of such property consists in its free and undisturbed use and enjoyment for religious worship."

[2] McLaughlin *v.* Kelly, 22 Cal. 211; Imperial etc. *v.* Broadbent, 7 H. L. 612; Lowndes *v.* Bettle, 33 L. J. Ch. 451.

CHAPTER XI.

OF INJUNCTIONS AGAINST NUISANCE.

I. GROUNDS OF THE JURISDICTION.
II. NUISANCES TO BUILDINGS.
III. NUISANCES TO WATER.
IV. PUBLIC NUISANCES.
V. ROADS AND RAILWAYS.
VI. BRIDGES.
VII. SPECIAL NUISANCES.

I. GROUNDS OF THE JURISDICTION.

§ 485. Foundation for the relief; jurisdiction closely allied to that in trespass; distinction.
486. Right should be first established at law; injury must be irreparable.
487. Injunction not allowed where questions in dispute are pending in action at law.
488. Relief not granted against an uncertain or contingent nuisance.
489. Writ not allowed in first instance where it is uncertain whether structure will prove a nuisance.

§ 485. The foundation for the interference of equity in restraint of nuisances rests in the necessity of preventing irreparable mischief and multiplicity of suits. The principles governing courts of equity in the exercise of this jurisdiction are closely allied to those which control their action in restraining trespasses. The distinction between trespass and nuisance consists in the former being a direct infringement of one's rights of property, while in the latter case the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from it. In the one case the injury is immediate, in the other it is consequential and generally results from the commission of

an act beyond the limits of the property affected.[1] And the injury must be such as is not susceptible of adequate pecuniary compensation in damages, or one the continuance of which would cause a constantly recurring grievance.[2]

§ 486. The concurrent jurisdiction of courts of equity, by the writ of injunction, with courts of law in cases of private nuisance is ancient and well-established.[3] To warrant the interference, a strong case of imperative necessity must appear, and the nuisance must be in derogation of rights long previously enjoyed.[4] As a general rule it is necessary that the person seeking the aid of equity to restrain a private nuisance should have first established his right at law, and where the right is doubtful and has not been established, the relief will be withheld.[5] Thus, where complainant has failed to obtain judgment against defendants in an action at law for

[1] Reynolds *v.* Clarke, 2 Ld. Raym. 1399; Weston *v.* Woodcock, 5 M. & W. 587.

[2] New York *v.* Mapes, 6 Johns. Ch. 46; Mohawk *v.* Artcher, 6 Paige, 83; Dana *v.* Valentine, 5 Met. 8.

[3] Gardner *v.* Newburgh, 2 Johns. Ch. 162

[4] Van Bergen *v.* Van Bergen, 3 Johns. Ch. 282; Porter *v.* Witham, 17 Maine, 292.

[5] Mayor etc. *v.* Curtiss, Clarke Ch. 836; Rhea *v.* Forsyth, 37 Pa. St. 503; Arnold *v.* Klepper, 24 Mo. 273; Porter *v.* Witham, 17 Maine, 392; Mammoth etc. Co.'s Appeal, 54 Pa. St. 183; Van Bergen *v.* Van Bergen, 3 Johns. Ch. 282; McCord *v.* Iker, 12 Ohio, 387. In the latter case, Read, J., observes: "The ground upon which the interference of a court of equity is invoked, is that the mischief to complainant's property is irreparable, and that actions at law furnish no adequate relief. Whilst this is an admitted ground of equity jurisdiction, courts of chancery will carefully abstain from interference where the injury will support an action at law, unless the party seeking such aid brings himself within the clearest principle of equitable relief. But if it be necessary to prevent a permanent injury to property, or its entire ruin, from the erection and continuance of a nuisance, and the law can not prevent the evil, equity will interfere, although the property itself may be of small value. But, in cases of this sort, equity will not interfere until the right and the facts have been established, beyond doubt, at law." The rule, however, requiring the right to be first established at law is to be understood as applying only to cases where the right is itself doubtful or in dispute. See § 516, *post*, and cases cited.

the nuisance, and legal proceedings are still pending, the injunction will be denied.[1] The rule, however, is limited to cases where the right is doubtful or is actually in dispute.[2] And where defendant's right to erect the structure complained of as a nuisance is in dispute, and is not clearly established at law, the court will not interfere.[3] So, too, if it does not appear that the person aggrieved was without adequate remedy at law, the relief will not be granted.[4] Nor will equity interfere where the injury is of a trifling or merely nominal character.[5] Though an injury, slight in itself, may by frequent recurrence assume such proportions as to warrant the interference of equity.[6] To warrant the exercise of the jurisdiction in restraint of nuisance, the same irreparable injury must be shown as in the case of trespass, and where this does not appear the person will be left to his remedy at law.[7]

§ 487. He who seeks an injunction against a nuisance is not regarded as having sufficiently established his rights at law by obtaining a judgment, if the action in which the judgment was recovered is still pending upon a writ of review.[8] Nor will equity interfere to restrain a nuisance unless it has undivided jurisdiction over the whole litigation, and where some of the questions in dispute are pending in actions at law an injunction will not be allowed.[9]

§ 488. Where the injury complained of is not, *per se*, a nuisance, but may or may not become so, according to circum-

[1] Durant *v.* Williamson, 3 Halst. Ch. 547.
[2] White *v.* Forbes, Walk. Mich. 112.
[3] Irwin *v.* Dixion, 9 How. 10.
[4] Parker *v.* Winnipiseogee etc., 2 Black, 545.
[5] McCord *v.* Iker, 12 Ohio, 387; Attorney General *v.* Sheffield etc., 3 De Gex, M. & G. 304; Swaine *v.* Great etc., 33 L. J. Ch. 399.
[6] Coulson *v.* White, 3 Atk. 21; Attorney General *v.* Sheffield etc., 3 De Gex, M. & G. 304.
[7] Fort *v.* Groves, 29 Md. 188.
[8] Eastman *v.* Amoskeag etc., 47 N. H. 71.
[9] Id.

stances, and where it is uncertain, indefinite or contingent, or productive of only possible injury, equity will not interfere.[1]

[1] Kirkman v. Handy, 11 Humph. 406; Laughlin v. President etc., 6 Ind. 228; Dunning v. Aurora, 40 Ill. 481; Lake View v. Letz, 44 Ill. 81; Gwin v. Melmoth, Freem. Ch. 505; Thebaut v. Canova, 11 Fla. 143; Rhodes v. Dunbar, 57 Pa. St. 274; Simpson v. Justice, 8 Ired. Eq. 115; Mohawk etc. v. Utica etc., 6 Paige, 554. This was a bill for an injunction to restrain defendants from the erection of a railroad bridge over the Mohawk river below complainant's bridge, one ground upon which relief was asked being that the proposed erection would endanger the safety of complainant's bridge by damming up the ice. Walworth, Chancellor, says: "The principles upon which this court should proceed in granting or refusing relief by injunction in cases of this kind, are correctly laid down by Lord Brougham in the recent case of The Earl of Ripon v. Hobart, (Cooper's Rep. Temp. Brougham, 343). If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, where the complainant's right is not doubtful, without waiting for the result of a trial. But where the thing sought to be restrained is not in itself noxious, but only something which may according to circumstances prove to be so, the court will refuse to interfere until the matter has been tried at law by an action; though in particular cases the court may direct an issue, for its own satisfaction, where an action could not be brought in such a form as to meet the question." And in the Earl of Ripon v. Hobart, 3 Myl. & K. 169, to which reference is here made by Chancellor Walworth, Lord Brougham observes: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial; and will, according to the circumstances, direct an issue or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But, where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, the court will refuse to interfere, until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court, where an action could not be framed so as to meet the question. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable, which would be very slow to interfere, where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property, which are *prima facie* harmless or even praiseworthy, is equally manifest. And it is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all, is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it, even in cases where the

Thus, the erection of a wharf,[1] a railroad bridge,[2] a planing mill,[3] a livery stable,[4] or a turpentine distillery,[5] will not be enjoined where the injury is only a possible and contingent one. So, too, the relief will be withheld where the benefit to the public to be derived from the existence of the thing complained of outweighs the private inconvenience, since the injury to one family or person will not be allowed to counterbalance the public benefit.[6] And if, in addition to the danger being remote, the right is also doubtful, the injunction will not be granted.[7] It is also held that complainant must show that the act from which he seeks relief is illegal, before equity will interfere.[8]

§ 489. Where an injunction is asked to restrain the construction of works of such a nature that it is impossible for the court to know, until they are completed and in operation, whether they will or will not constitute a nuisance, the writ will be refused in the first instance.[9] Nor in such a case will the motion for an interlocutory injunction be allowed to stand over until the work is so far executed that its character may be determined.[10]

thing or the act complained of was admitted to be directly and immediately hurtful to the complainant. All that has been said in the cases where this unwillingness has appeared, may be referred to in support of the proposition which I have stated; as in the Attorney General *v.* Nichol, 16 Ves. 338; Attorney General *v.* Cleaver, 18 Ves. 211; and an anonymous case before Lord Thurlow, in 1 Ves. Jr. 140, and others. It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the interposition by injunction in the case of what we have been regarding as eventual or contingent nuisance."

[1] Laughlin *v.* President etc., 6 Ind. 223.

[2] Mohawk etc. *v.* Utica etc., 6 Paige, 554.

[3] Rhodes *v.* Dunbar, 57 Pa. St. 274.

[4] Kirkman *v.* Handy, 11 Humph. 406.

[5] Simpson *v.* Justice, 8 Ired. Eq. 115.

[6] Attorney General *v.* Perkins, 2 Dev. Eq. 38; Same *v.* Lea's Heirs, 3 Ired. Eq. 302; Wilder *v.* Strickland, 2 Jones Eq. 386.

[7] Mayor etc. *v* Curtiss, Clarke Ch. 336.

[8] Bruce *v.* President etc., 19 Barb. 371.

[9] Haines *v.* Taylor, 2 Ph. 209.

[10] Id.

II. Nuisances to Buildings.

§ 490. General rule.
491. Peril to health a ground for relief.
492. Cattle yards, when a nuisance.
493. Manufacture of gas, when enjoined.
494. Delay fatal to the relief; period of delay.
495. Great caution exercised in restraining works of public convenience.
496. Effect of injury to surrounding property.
497. Dissolution.
498. Relief allowed where damages can not be adjusted at law.
499. Alterations in dwellings, when enjoined; party walls.
500. Of the parties to the bill.

§ 490. The most frequent instance of nuisances of a strictly private nature occurs in the erection of structures obnoxious or hurtful to buildings used for residence and business purposes. The law may be regarded as settled, that when a business, though lawful in itself, becomes obnoxious to neighboring dwellings and renders their enjoyment uncomfortable, whether by smoke, cinders, noise, offensive odors, or otherwise, the carrying on of such business is a nuisance which equity will restrain.[1] Nor is it necessary that the nuisance be injurious to health to warrant the interference,[2] but mere noise will, in a proper case, suffice to justify a court of equity in interfering,[3] and the relief has been granted against the ringing of bells in such manner as to annoy a neighboring resident.[4] And the fact that the nuisance is not perpetual, but will only recur occasionally, and then but for a short period, will not avail the defendant if it be an unmistakable nuisance.[5]

[1] Ross *v.* Butler, 4 C. E. Green, 294; Cleveland *v.* Citizens etc., 5 C. E. Green, 201; Babcock *v.* New Jersey etc., Ib. 296. And see Attorney General *v.* Steward, Ib. 415.

[2] Ross *v.* Butler, 4 C. E. Green, 294.

[3] White *v.* Cohen, 1 Drew. 313.

[4] Soltau *v.* DeHeld, 2 Sim. N. S. 133.

[5] Ross *v.* Butler, 4 C. E. Green, 294.

§ 491. Where loss of health, destruction of business, and irreparable injury to property will result from the obnoxious erection, equity will not hesitate to interfere. Thus, the burning of brick so near a dwelling as to expose the premises to danger from fire and to imperil the health of the inmates,[1] or the erection of a chandlery,[2] or of a slaughter house,[3] or of a livery stable,[4] if so near a residence as to imperil the comfort and health of its inmates, will be enjoined. And mere smoke or disagreeable odors, though not noxious, may be a sufficient ground for the interference of equity.[5]

§ 492. The smell or stench arising from the keeping of live hogs in cattle yards in such numbers and for such length of time as to affect the health or comfort of surrounding residents, is a nuisance which equity will enjoin.[6] And permitting blood and other offal from such animals to run into the waters of a bay may also be enjoined as a nuisance.[7]

§ 493. The manufacture of gas in such manner as to produce serious annoyance to persons dwelling in adjoining houses, whether by smoke, gases, effluvia, or odors that may issue from the works, is such a nuisance as to warrant the interposition of a court of equity by injunction.[8] But the erection of buildings which are to be used for the manufacture of the gas, will not necessarily be enjoined before it is demonstrated that the works will be conducted in such manner as to cause substantial discomfort.[9]

[1] Fuselier *v.* Spalding, 2 La. An. 773; Walter *v.* Selfe, 4 Eng. L. & E. 15.

[2] Howard *v.* Lee, 3 Sandf. 281.

[3] Peck *v.* Elder, 3 Sandf. 126; Rex *v.* Cross, 2 Car. & P. 484.

[4] Coker *v.* Birge, 9 Geo. 425; Same *v.* Same, 10 Geo. 336.

[5] Crump *v.* Lambert, L. R. 3 Eq. 409, 17 L. T. N. S. 133.

[6] Babcock *v.* New Jersey etc., 5 C. E. Green, 296.

[7] Id. And see Attorney General *v.* Steward, 5 C. E. Green, 415.

[8] Cleveland *v.* Citizens etc., 5 C. E. Green, 201.

[9] Id. This was a bill for an injunction to restrain the erection of gas works in such close proximity to complainants' residences as to render them uncomfortable. The general principles guiding courts of equity in administering relief in this class of cases are well laid down by Zabriskie, Ch., as follows: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained; and smoke, noise and

§ 494. He who seeks relief against a nuisance must show due diligence in the assertion of his rights; and where complainant has been guilty of great laches, or has allowed defendant for a long period to continue in the erection of his obnoxious structure at great expense and without molestation, equity will not interfere.[1] Even where the cause of complaint has been temporarily removed and is about to be renewed, complainants, who have long slept on their rights, will not be allowed to enjoin it as a renewal of the nuisance, and thus put themselves in the position from which their own laches has

bad odors, even when not injurious to health, may render a dwelling so uncomfortable, as to drive from it any one not compelled by poverty to remain. Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated, make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life, is a wrong which the law will redress. The only question is what amounts to that discomfort from which the law will protect. The discomforts must be physical, not such as depend upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so, because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort. Other persons or classes of persons whose senses have not been so hardened, and who by their education and habits of life, retain the sensitiveness of their natural organization, are entitled to enjoy life in comfort as they are constituted. The law knows no distinction of classes, and will protect any citizen or classes of citizens, from wrongs and grievances that might perhaps be borne by others, without suffering or much inconvenience. The complainants have houses built, and held for the purpose of residences, by families of means and respectability, and anything that by producing physical discomfort would render them unfit for such residences, or drive such families from them, is a nuisance, which the law will restrain. This, then, is the question before me: whether the proposed works of the defendants would produce such annoyance as would render such families, composed of women and children, as well as men, uncomfortable: not whether men accustomed to follow their occupations in places where they are surrounded, and unavoidably, by much that is offensive, may not be so accustomed to odors of like nature as not to be annoyed by these."

[1] Parker v. Winnipiseogee etc., 2 Black, 545; Tichenor v. Wilson, 4 Halst. Ch. 197; Dana v. Valentine, 5 Met. 8; Weller v. Smeaton, 1 Cox, 102; Reid v. Gifford, 6 Johns. Ch. 19; Southard v. Morris etc., Saxt. 518.

debarred them.[1] It is difficult to fix any precise period of delay as fatal to complainant's right to relief against the nuisance, but where defendant has for more than twenty years carried on his trade without molestation, and proves a good *prima facie* title by prescription, equity will not interfere, but will leave the parties to seek their remedy at law.[2] And it has frequently been decided that where the works complained of had been allowed to stand three years and upward, it was such laches as would prevent relief in equity.[3]

§ 495. Great caution is exercised in interfering with establishments and erections which tend to promote public convenience, as in the case of mills, and in such cases it will not suffice to show a probable or contingent injury, but it must be shown to be inevitable and undoubted.[4] And where a statute provides ample remedy at law for the damages incurred, the injunction will not be allowed.[5]

§ 496. It is no ground for interference that the erection of the alleged nuisance would prevent the use of surrounding property for such buildings as, in the ordinary course of affairs and the extension of a city, would be erected,[6] nor that it would increase the rate of insurance on surrounding buildings.[7] So, too, equity will not interfere in behalf of the owners of vacant lots to enjoin the carrying on of a soap factory, on the ground that it prevents the lots from being built upon and diminishes their value, since the proper

[1] Southard *v.* Morris etc., Saxt. 518. Defendants at great expense had erected a dam and works, which had continued for several years without molestation from complainant. The water having been temporarily drawn off and defendants being about to raise it to its former height, complainant sought an injunction to prevent them from so doing. The relief was refused upon the principles stated in the text.

[2] Dana *v.* Valentine, 5 Met. 8.

[3] Weller *v.* Smeaton, 1 Cox, 102; Reid *v.* Gifford, 6 Johns. Ch. 19; Tichenor *v.* Wilson, 4 Halst. Ch. 197.

[4] Barnes *v.* Calhoun, 2 Ired. Eq. 199; Attorney General *v.* Perkins, 2 Dev. Eq. 38.

[5] Barnes *v.* Calhoun, 2 Ired. Eq. 199.

[6] Rhodes *v.* Dunbar, 57 Pa. St. 274.

[7] Id.

remedy is by an action at law to recover damages for the diminished value of the property.[1]

§ 497. The fact that the answer, while admitting the material facts charged in the bill, denies the conclusion that the erection would be a nuisance, will not warrant a dissolution of the injunction.[2] But, if upon bill and answer it does not appear that the structure complained of is *prima facie* a nuisance, the injunction will be dissolved, the defendant, however, proceeding at his peril in the erection.[3] Nor will an injunction be continued against the erection of a structure where the facts do not satisfactorily show a probability of irreparable injury to complainants, or that it would endanger their lives or health, or prove materially injurious to their comfort.[4]

§ 498. Relief by injunction is sometimes granted where damages for the commission of the nuisance would be difficult of adjustment pecuniarily, thus rendering the remedy at law ineffectual. Upon this ground the erection of a mill so near a railway track as not to leave room for repairing the track, has been enjoined as a nuisance.[5] And it is held that a bill to enjoin the erection of a nuisance in close proximity to complainant's buildings, which contains allegations of irreparable injury to complainant, is not demurrable for want of equity, nor as stating a case in which the sole remedy is at law, nor because it fails to show that the rights of the parties have been settled at law.[6]

§ 499. Lessees of a building who have rented upon representations to the lessor that they desired the building for a private dwelling, may be enjoined from altering it in such

[1] Dana *v.* Valentine, 5 Met. 8.

[2] Coker *v.* Birge, 9 Geo. 425.

[3] Mygatt *v.* Goetchins, 20 Geo. 350; Cunningham *v.* Rice, 28 Geo. 30.

[4] Thebaut *v.* Canova, 11 Fla. 143.

[5] Cunningham *v.* Rome etc., 27 Geo. 499.

[6] Aldrich *v.* Howard, 7 R. I. 87. And in Porter *v.* Witham, 17 Maine, 292, it is held that, unless complainant's right has been established at law, he must show a long and uninterrupted user to warrant the interposition of equity. But the weight of authority would seem to be against this position.

manner as to carry on the business of coach making, the house being in danger of falling from the alterations.[1] And the converting of old houses in a large city to purposes which render them dangerous to the public may be enjoined as a nuisance.[2] So where party walls are required by law to be of solid brick or stone, without openings, the erection by a lot owner of a party wall containing windows constitutes such a nuisance as comes within the restraining powers of equity and it will be enjoined.[3]

§ 500. As regards the parties who may bring the action to restrain a nuisance to buildings, as a general rule the person occupying the premises should be made complainant with the owner, though the action may be brought in the name of the owner alone.[4] And in the case of nuisance to a dwelling house, the injunction will be made mandatory if the circumstances of the case require it.[5]

[1] Bonnett *v.* Sadler, 14 Ves. 526.

[2] Mayor etc. *v.* Bolt, 5 Ves. 129. In this case certain old houses in London were about to be pulled down in making improvements in the city, and defendant had stored in them large quantities of sugar, so that two of the houses had actually fallen and others were in great danger. Defendant was enjoined from further using the buildings as storehouses.

[3] Vollmer's Appeal, 61 Pa. St. 118.

[4] Sutton *v.* Montfort, 4 Sim. 559; Jackson *v.* Newcastle, 33 L. J. Ch. 698.

[5] Gale *v.* Abbott, 8 Jur. N. S. 987; Hervey *v.* Smith, 1 Kay. & J. 392.

III. Nuisances to Water.

§ 501. Foundation of the jurisdiction.
502. The jurisdiction ancient and well established.
503. Where injury is difficult of estimation injunction allowed; diversion of water.
504. In general right should be established at law.
505. Party's own negligence a bar to relief.
506. Owner will be protected in quality as well as quantity of water.
507. Adverse possession may bar relief.
508. Limitations upon the rule; laches.
509. Surface water; subterranean streams.
510. Construction of levee, when enjoined.
511. Alterations in navigable streams.
512. Mandatory injunctions against nuisance.
513. Filling up of a stream may be enjoined.
514. Mill dams.
515. Tenants in common of mill privileges.
516. Mere value of mill property no test; limitation upon rule requiring right to be established at law.
517. Wasting water; destruction of mill dam.
518. Irreparable damage a condition of the relief.

§ 501. The interference of equity by the writ of injunction is frequently invoked to restrain nuisances to water and the infringement of riparian rights. As an incident to the ownership of the adjacent soil, a riparian proprietor has an interest of a usufructuary nature in the water flowing past his land, which equity will protect. This right or interest being common to all owners of land adjacent to a stream, no proprietor can, in the absence of a right to exclusive enjoyment, use the water in such manner as to injure adjoining proprietors. Nor can he, unless authorized by adjacent owners, divert the water from its natural course, to the injury of the owner below, or change its quality, or diminish its quantity, or cause it to flow back upon the proprietor above.[1] And the test to be applied in such cases is whether the use of

[1] Webb v. Portland etc., 3 Sumner, 189; Bealey v. Shaw, 6 East, 208; Mason v. Hill, 5 B & A. 1.

the water is such as to cause a substantial injury to other proprietors in their common right.[1]

§ 502. The jurisdiction in this class of cases may be regarded as ancient and well established. It is founded upon the pressing necessity of immediate relief being granted where, in the absence of such relief, permanent mischief and lasting injury might result,[2] and also rests upon the necessity of preventing multiplicity of suits.[3] And the right being established, together with the wrongful interruption of that right tending to the great injury of the person aggrieved, equity will interfere.[4]

§ 503. Where the extent of the injuries resulting from the invasion of the right is difficult of estimation, an injunction is regarded as the most efficient remedy.[5] And riparian proprietors, owning to the center of a stream, are entitled to the aid of equity to prevent a diversion of the waters from their natural channel. Nor does the neglect of complainants to use or appropriate the water power, or the fact that they have, as yet, sustained but small pecuniary damage, or that defendants would be subjected to heavy expense if compelled to restore the water to its original channel, present such objections as would warrant a court of equity in refusing the relief.[6] And where one owns land on both sides of a stream not navigable, and never declared a public highway, he is

[1] Tyler *v.* Wilkinson, 4 Mas. 397.

[2] Gardner *v.* Newburgh, 2 Johns. Ch. 162, and cases cited.

[3] Lyon *v.* McLaughlin, 32 Vt. 423.

[4] Gardner *v.* Newburgh, 2 Johns. Ch. 162, and cases cited.

[5] Lyon *v.* McLaughlin, 32 Vt. 423. The court say: "When the invasion of a right in this kind of property is threatened and intended, which is necessarily to be continuing and operate prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the writ of injunction is not only permissible, but is the most appropriate means of remedy. It affords in fact the only adequate and sure remedy. The very doubtfulness as to the extent of the prospective injury and the impossibility of ascertaining the measure of just reparation render such an injury irreparable in the sense of the law relating to this subject."

[6] Corning *v.* Troy etc., 34 Barb. 485; Same *v.* Same, 29 Barb. 311. Tuolumne etc. *v.* Chapman, 8 Cal. 392.

entitled to an injunction to restrain the floating of logs down his stream to the injury of his dam.[1]

§ 504. In general it must be made to appear that complainant's right to enjoy the land has been satisfactorily established at law.[2] And where this does not appear, and it is not alleged that there is danger of irreparable mischief or of injury not susceptible of compensation in a suit at law, the bill is obnoxious to a demurrer for want of equity.[3] A diversion of water from complainant's mills, where valuable and extensive machinery is being used and employment furnished to a large number of men, constitutes a sufficient ground for an injunction.[4] But the construction of an artificial channel which merely has the effect of giving a more direct course to water which had from time immemorial drained off through a natural outlet, will not be enjoined, the volume of water not being increased.[5]

§ 505. While a court of equity may interfere for the protection of the legal right to the use of water in a stream which is being fouled, and whose value is being impaired for manufacturing purposes, by defendant's works farther up the stream, yet if complainants have not used due diligence in the assertion of their rights, and have for a long period allowed defendants to erect and operate their works without objection, an injunction will be refused, especially where the injury complained of can be compensated in damages at law, and the granting of the relief would inflict serious injury upon defendants without doing any practical good to complainants.[6]

§ 506. The right of the owner of the realty through which a stream of water flows to the uninterrupted use and enjoy-

[1] Curtis v. Keesler, 14 Barb. 511.

[2] Coe v. Winnipiseogee etc., 37 N. H. 255; Weller v. Smeaton, 1 Cox, 102. But see, *contra*, Corning v. Troy etc., 40 N. Y. 191; Morris etc. v. Central etc., 1 C. E. Green, 419.

[3] Coe v. Winnipiseogee etc., 37 N. H. 255. But it is held that complainant need not first establish his title at law where the averments of his rights are admitted by demurrer. Tuolumne etc. v. Chapman, 8 Cal. 392.

[4] Wright v. Moore, 38 Ala. 593.

[5] Potier's Ex'rs. v. Burden, 38 Ala. 651.

[6] Wood v. Sutcliffe, 2 Sim. N. S. 163.

ment of the stream, extends to the quality as well as to the quantity of the water.[1] Hence any use of the water which operates to destroy health or diminish the comfort of a riparian owner will be enjoined as a constantly recurring injury, irreparable in its nature and not susceptible of adequate compensation in damages.[2] But it is to be observed that past injuries afford no ground for the relief, and where it does not certainly appear that the diversion of the water will be repeated, or that there is danger of its being repeated, to the injury of complainant, the injunction will not be allowed.[3]

§ 507. Adverse possession and exercise of the right of diverting the water for twenty years, is sufficient to raise a presumption of a grant and defeat complainant's right to an injunction against a private nuisance.[4] And this upon the principle that as twenty years possession gives rise to a presumption of a grant, so a non-user for that length of time will put an end to the presumption.[5] But the extent of the prescriptive right must be limited by the actual enjoyment and must be commensurate with that enjoyment.[6] And to bring a case within the rule, the possession of the one must be so inconsistent with the rights of the other as to amount to an actual ouster.[7]

§ 508. The person gaining a right to the use of water by adverse enjoyment for the required period is entitled to what he has enjoyed during that period, and to no more.[8] Thus, if he has exercised the right to use the water upon certain

[1] Bealey *v.* Shaw, 6 East, 208.

[2] Holsman *v.* Boiling etc., 1 McCart, 335; Lewis *v.* Stein, 16 Ala. 214.

[3] Society etc. *v.* Morris etc., Saxt. 157; Potier's Ex'rs. *v.* Burden, 38 Ala. 651; Cobb *v.* Smith, 16 Wis. 661.

[4] Shields *v.* Arndt, 3 Green Ch. 234; Coalter *v.* Hunter, 4 Rand. 58; Holsman *v.* Boiling etc., 1 McCart. 335; McCallum *v.* Germantown, 54 Pa. St. 40. But in the case of a public nuisance it would seem that no length of user and occupancy, however extended and under whatever claim of right, will avail. Rochester *v.* Erickson, 46 Barb. 92.

[5] Shields v. Arndt, 3 Green Ch. 234.

[6] Holsman *v.* Boiling etc., 1 McCart. 335.

[7] Pratt *v.* Lamson, 2 Allen, 275.

[8] Bealey *v.* Shaw, 6 East, 208; Davies *v.* Williams, 16 Q. B. 546.

days of the week, or in certain quantities, he can not use it upon other days or in different quantities.[1] And the user must clearly appear to have been adverse to the right of the other owner, and where the use of the water was originally granted as a loan without consideration, and was afterward continued as a loan, equity will withhold its aid.[2] Nor will an injunction be allowed to restrain the overflow and setting back of water by the erection of a dam where the person aggrieved has for a long period lain upon his rights and permitted the dam to be several times rebuilt without objection, since he has been guilty of such laches as to entitle him to no consideration in a court of equity.[3]

§ 509. Though equity may, as we have already seen, properly interfere where the injury is not susceptible of adequate compensation in damages, or such as, from its continuance, must occasion a constantly recurring grievance, yet the leading of surface water upon the land of another, the injury being definitely ascertained by witnesses, is not sufficient to warrant the interference.[4] And since it is impossible to establish correlative rights in subterranean streams, the situation of which is not known, an injunction will not be granted against the construction of a cemetery on the ground that the drainage from the subterranean streams would destroy the use of complainant's spring and greatly injure his land.[5] And the digging a well on one's own premises, the result of which is to dry up a spring upon adjoining premises, does not warrant a court of equity in interfering, there being no apparent or visible connection between the well and the spring, and the water merely percolating into defendant's land.[6] But the owner of real estate may enjoin a municipal coporation from draining off, through an artificial channel, a pond or reservoir

[1] Strutt v. Bovingdon, 5 Esp. 56; Brown v. Best, 1 Wils. 174.

[2] Coalter v. Hunter, 4 Rand. 58.

[3] Sheldon v. Rockwell, 9 Wis. 166, a delay of nineteen years; Cobb v Smith, 16 Wis. 661, a delay of ten years.

[4] Laney v. Jasper, 39 Ill. 46.

[5] Greencastle v. Hazelett, 23 Ind. 186.

[6] Mosier v. Caldwell, 7 Nev. 363. And see Trustees v. Youmans, 50 Barb. 316.

adjoining his premises in such manner as to overflow them and cause permanent injury.[1]

§ 510. The construction of a levee may be enjoined where its effect would be to obstruct the drainage of water from complainant's land, and, by causing its overflow, prove injurious to health.[2] And in such case the relief may also be granted where complainant's rights have not been concluded by any just compensation for the loss or injury, the damage promising to be irreparable, and the jurisdiction is regarded as inherent in the powers of a court of chancery.[3]

§ 511. A bill will lie in behalf of the United States for an injunction to protect improvements, which are being made by authority of congress in navigable waters, from injury by works carried on under authority of a state.[4] But where the injury apprehended from an alteration in a navigable stream by agents of the government is mere matter of opinion, and is denied by defendant, the injunction will be refused.[5] The remedy by injunction being primarily *in personam*, a nuisance consisting of an injury to water rights may be enjoined in the state which has jurisdiction of the person regardless of the *locus* of the nuisance itself.[6]

§ 512. Although a court of equity will not grant a mandatory injunction to restore the banks of a canal and to make

[1] Pettigrew *v.* Evansville, 25 Wis. 223.

[2] Martin, *ex parte*, 13 Ark. 198.

[3] Id.

[4] United States *v.* Duluth, 1 Dillon C. C. 469.

[5] Avery *v.* Fox, 1 Abb. U. S. R. 246. It is held in this case that where congress entrusts an appropriation for public improvements to one of the departments, which in turn employs agents to do the work, this department and its agents may be restrained from doing the work in an improper manner, even though an injunction will not lie against the United States.

[6] Great Falls etc. *v.* Worster, 23 N. H. 462. And in Portarlington *v.* Soulby, 3 Myl. & K. 104, the same principle was recognized upon a bill filed in England to restrain respondents from bringing an action at law in Ireland on a bill of exchange given for a gambling debt. But see, *contra*, Stillman *v.* White Rock etc., 3 Woodb. & M. 538, where it is held that the jurisdiction is *in rem*, and that a nuisance consisting of a diversion of water from a river which is the boundary line between two states must be enjoined in the state where the nuisance is located.

other repairs upon and about canals and reservoirs leased by defendant to complainant, yet substantially the same result may be attained by an order restraining defendant from impeding or hindering complainant in the use of the water granted by his lease, by continuing to keep the canals and works out of repair, and by diverting the water and hindering complainant in its use.[1] And a mandatory injunction may be granted to compel the restoration of water to its natural channel which has been wrongfully diverted therefrom.[2]

§ 513. The filling up of the original channel of a stream with the refuse and offcast from an adjacent mine, to such an extent as to back the water up to complainant's mill dam, constitutes such a nuisance as to warrant relief by injunc-

[1] Lane *v.* Newdigate, 10 Ves. 192.

[2] Corning *v.* Troy etc., 40 N. Y. 191. This was an action for a mandatory injunction to compel defendants to restore a stream of water to its natural channel and thus allow plaintiffs the use to which they were entitled. Grover, J., says: "Upon established principles this is a proper case of equity jurisdiction. First, upon the ground that the remedy at law is inadequate. The plaintiffs are entitled to the flow of the stream in its natural channel. Legal remedies can not restore it to them and secure them in the enjoyment of it. Hence the duty of a court of equity to interpose for the accomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid, the only remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and thus endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no such defect. The right of the plaintiffs to the equitable relief sought is established by authority as well as principle. (Webb *v.* The Portland Manufacturing Co., 3 Sumner, 190, and cases cited; Tyler *v.* Wilkinson, 4 Mason, 400; Townsend *v.* McDonald, 2 Kernan, 381; 2 Story's Equity, §§ 901, 926–7; Angel on Water Courses, §§ 449–50.) It is further insisted by the defendant that equity will not interpose until the right has been settled at law. That formerly was the universal rule, where there was any substantial doubt as to the legal right. (Gardner *v.* The Trustees of Newburgh, 2 John. Ch. 162.) But that rule no longer prevails in this state. We have before seen that all the relief to which a party is entitled, arising from the same transaction, may, under the code, be obtained in one suit. Besides there is no doubt as to the legal right in the present case.

tion.[1] And where defendants in such case persist in making deposits of earth in such manner as to obstruct the flow of the water, to the manifest injury of complainant, the injunction will be continued.[2]

§ 514. The erection of a mill dam in such manner that the inundation caused by the back flowage of the water lessens the value of complainant's land, destroys his timber and perils the health of the neighborhood, will be enjoined.[3] So if a dam is erected below complainant's land, and so near that the back flowage covers it and prevents its use, equity will interfere.[4] So, too, the threatened destruction of a mill dam and the drawing off of the water are injuries over which equity will exercise its restraining jurisdiction where it is made to appear that irreparable mischief would otherwise result.[5] And it is to be observed that the jurisdiction is exercised, not in derogation of the remedy at law, but rather because the legal remedy is insufficient, and because of the danger of irreparable mischief before it can be applied.[6]

§ 515. The relief is sometimes sought between tenants in common of water privileges, and the fact of co-tenancy will not prevent the exercise of the jurisdiction.[7] Thus, where the parties are tenants in common of a mill, mill dam and water privilege, one of the co-tenants will be restrained from diverting the water to a private mill of his own in such manner as to prevent complainant's manufactory from running except for a short time daily.[8] So where tenants in

[1] Lamborn *v.* Covington Company, 2 Md. Ch. 409.

[2] Id.

[3] White *v.* Forbes, Walk. Mich. 112; Whitfield *v.* Rogers, 26 Miss. 84. And see Robinson *v.* Byron, 1 Bro. C. C. 588.

[4] Bemis *v.* Upham, 13 Pick. 169. And this, even though under a statute of the state a remedy might have been had at law as for a nuisance, the court holding that under a general statute authorizing courts of equity to hear and determine any matter touching waste or nuisance in which there was not a plain and adequate remedy at law, equity was entitled to jurisdiction in the case, the legal remedy being insufficient.

[5] Winnipiseogee etc. *v.* Worster, 29 N. H. 433, and cases cited.

[6] Id.

[7] Kennedy *v.* Scovil, 12 Conn. 316; Bliss *v.* Rice, 17 Pick. 23.

[8] Kennedy *v.* Scovil, 12 Conn. 316.

common of a mill and dam are entitled to their use alternately in proportion to their interests, one of them will be restrained from diverting the water through a private channel on his own premises during the other's term of use.[1]

§ 516. Where an injunction is sought to prevent interference with the enjoyment of property by the erection of a dam, equity will not be governed by the mere value of the property.[2] Nor will the relief be denied because complainant's title has not been established in an action at law, since the modern doctrine of courts of equity in this respect is much more liberal than the ancient, and the rule requiring the right to be first established at law prevails only in cases where the right itself is in dispute or is doubtful.[3] Therefore a bill to enjoin the further construction and maintenance of a mill dam is not demurrable for want of equity in that it contains no allegation of complainant's right having been established in a suit at law.[4]

§ 517. Equity will restrain defendants from wasting water running to complainant's mill, and thereby diminishing their water power.[5] If, however, the injury is small and can be adequately compensated in damages, equity will not interfere, but will leave the parties to their remedy at law.[6] Nor in

[1] Bliss v. Rice, 17 Pick. 23. But the court holding that each co-tenant had a right during his term to use the whole of the water in such way as he chose, without injury to the common property, refused to enjoin defendant to fill up his channel, or to desist from drawing water by such channel during his own term of using the mill.

[2] White v. Forbes, Walk. Mich. 112.

[3] Sprague v. Rhodes, 4 R. I. 301; White v. Forbes, Walk. Mich. 112.

[4] Sprague v. Rhodes, 4 R. I. 301. And it is also held in this case, though it would appear to be contrary to the weight of authority, that such a bill is not demurrable in failing to state a case of irreparable mischief.

[5] Ballou v. Inhabitants etc., 4 Gray, 324. In this case complainants had erected a reservoir to collect water for their mill during the dry season, and defendants raised the gate of the reservoir allowing the water to escape. Injunction was held to be the proper remedy on the ground that the injury was a private nuisance, and a statute giving the court jurisdiction in equity in all cases of nuisance the remedy was proper, the remedy at law not being plain, adequate and sufficient. And see Bemis v. Upham, 13 Pick. 169, a case arising under the same statute.

[6] Quackenbush v. Van Riper, 2 Green Ch. 350.

such a case will it avail complainant that he has established his right at law.[1] But the rebuilding of a dam will be enjoined where, before it was swept away, its stagnant waters had proved so injurious to the neighborhood that an adjacent owner had recovered damages for the injury sustained.[2] And a municipal corporation may be restrained from destroying, without trial or notice, a mill dam authorized by statute, on a stream declared to be a public highway, on the ground that it is a nuisance. The injury threatened by the corporate authorities being permanent to the freehold, under a claim of right which is unfounded, and it being doubtful whether adequate compensation can be made in damages, an injunction is the proper remedy.[3]

§ 518. A temporary injunction, granted *ex parte* at the suit of the owner of a mill dam, to restrain a town from opening certain sluice ways in the dam, will be dissolved when it appears that its dissolution will not result in any loss to complainant which can not be repaired in damages, or that the dissolution will not affect the cause in a trial on the merits.[4] And a mere general and indefinite suggestion of irreparable mischief is not sufficient to warrant the interposition of equity, but there must be an allegation of some distinct and sufficient ground of such mischief.[5] And the fact of two verdicts having been recovered at law against a mill owner for keeping his dam too high, will not authorize an injunction restraining him from rebuilding it at all.[6]

[1] Quackenbush *v.* Van Riper, 2 Green Ch. 350.

[2] Miller *v.* Trueheart, 4 Leigh, 569. But if it is made to appear that certain expedients proposed by the mill owners may prevent the mischief complained of, the issue should be left to a jury to determine.

[3] Clark *v.* Mayor etc., 13 Barb. 32.

[4] Wing *v.* Fairhaven, 8 Cush. 363.

[5] Talley *v.* Tyree, 2 Rob. Va. 500.

[6] Id.

IV. Public Nuisances.

§ 519. Purpresture.
520. Erection of piers, when enjoined.
521. Injunction not allowed where remedy exists at law.
522. Private persons seeking injunction against public nuisances must show special injury.
523. Acts authorized by statute will not be enjoined.
524. Obstruction to flow of river through a city; obstruction to public square.
525. Public nuisance not usually enjoined in the absence of violation of private right.
526. Non-navigable stream; pendency of indictment no bar to relief by injunction.
527. Adverse possession no bar to injunction against public nuisance.

§ 519. One of the earliest recognized forms of public nuisance with which equity has interfered is that of purpresture. A purpresture was formerly held to be a close or enclosure, or in other words an encroachment whereby one person makes several to himself that which ought to be common to the public.[1] The later acceptation of the term, however, is that of an encroachment upon the rights of the sovereign, either by trespassing on his soil, or upon easements, such as highways, bridges, and public rivers.[2] And a still narrower signification has been given to the term by limiting it to an encroachment upon the soil of the seashore, or other tidal waters belonging to the sovereign, between high and low water mark.[3] The jurisdiction of equity in cases of purpresture, as well as of public nuisances generally, rests in the necessity of preventing irreparable mischief, and avoiding vexatious litigation. The equitable remedy is more efficacious than the remedy at law, since it has the effect, not only of

[1] 2 Coke Inst. 38, 272.

[2] New Orleans v. United States, 10 Pet. 662; Mohawk etc. v. Utica etc., 6 Paige, 554; Attorney General v. Cohoes Company, 6 Paige, 133.

[3] Attorney General v. Chamberlane, 4 Kay & J. 292.

abating nuisances already existing, but of restraining those which are threatened or in progress.[1]

§ 520. The unauthorized erection of a pier in a public harbor is a purpresture which will be restrained by injunction at the suit of the attorney general.[2] And such an erection will be regarded as a nuisance *per se*, and will be enjoined without evidence to show that it would, if erected, be a nuisance in fact.[3] But where it clearly appears that the erection of a pier or wharf in tidal waters, and upon soil thereunder, belonging to the state, would not constitute a public nuisance, and would not prove injurious to the harbor or to the people of the state, an injunction should not be allowed.[4] Where, however, the structure proposed would hinder navigation, it will not avail defendant to urge that the benefit to the public counterbalances the inconvenience.[5] It is held that in cases of doubt the question as to the existence of the nuisance should be determined by a jury before granting the injunction.[6] But any unauthorized appropriation of public property to private uses, amounting to a purpresture or public nuisance, is within the jurisdiction of equity to enjoin. And the cutting through the embankments of a public canal to draw off water for defendants' mills, comes within the rule and will be restrained.[7]

§ 521. Though the jurisdiction of equity in restraint of public nuisances is well established,[8] it will not be exercised where the object sought can be as well attained in the ordinary tribunals,[9] unless upon the application of one who suffers

[1] 2 Story's Eq. § 924; Attorney General *v.* Johnson, 2 Wils. Ch. 87.

[2] People *v.* Vanderbilt, 28 N. Y. 396; Same *v.* Same, 38 Barb. 282; Davis *v.* Mayor etc., 4 Kern. 526.

[3] People *v.* Vanderbilt, 38 Barb. 282.

[4] People *v.* Davidson, 30 Cal. 379.

[5] Rex *v.* Ward, 4 A. & E. 386.

[6] Attorney General *v.* Cohoes etc., 6 Paige, 133; Mohawk etc. *v.* Utica etc., 6 Paige, 554; Attorney General *v.* Cleaver, 18 Ves. 217.

[7] Attorney General *v.* Cohoes, 6 Paige, 133.

[8] State *v.* Mayor etc., 5 Port. 279; Water etc. *v.* Hudson, 2 Beas. 420.

[9] Water etc. *v.* Hudson, 2 Beas. 420; Morris etc. *v.* Prudden, 5 C. E. Green, 530.

a personal injury aside from the injury to the public, in which case an injunction may be allowed, even though there is a remedy at law by abatement of the nuisance and indictment of the offender.[1]

§ 522. No principle of the law of injunctions is more clearly established than that private persons, seeking the aid of equity to restrain a public nuisance, must show some special injury peculiar to themselves, aside from and independent of the general injury to the public.[2] Even in cases of unquestioned nuisance, if the party complaining shows no special injury to himself different from the common injury to the public, he is not entitled to an injunction.[3] In accordance with these principles, where it is made to appear after injunction granted that the injury suffered by complainant is sustained by him in common with every tax payer, and the damage is therefore not special or peculiar, the injunction will be dissolved.[4] And where the injury is doubtful and the evidence conflicting, the relief will generally be withheld.[5] It is held, however, that the fact of proceedings having been taken by the attorney general in behalf of the people to restrain a public nuisance will not prevent an individual, who sustains a special injury, from obtaining the relief.[6] But it

[1] Ewell v. Greenwood, 26 Iowa, 377. But the injury must be great and the necessity pressing. Morris etc. v. Prudden, 5 C. E. Green, 530.

[2] Bigelow v. Hartford etc., 14 Conn. 565; O'Brien v. Norwich, etc., 17 Conn. 372; Frink v. Lawrence, 20 Conn. 117; Doolittle v. Supervisors etc., 18 N. Y. 160; Corning v. Lowerre, 6 Johns. Ch. 439; Allen v. Board etc., 2 Beas. 68; Hinchman v. Paterson etc., 2 C. E. Green, 75; Mechling v. Kittanning etc., 1 Grant's Cases, 614; Beveridge v. Lacey, 3 Rand. 63; Dawson v. St. Paul etc., 15 Minn. 136; Walker v. Shepardson, 2 Wis. 384; Barnes v. Racine, 4 Wis. 454; Williams v. Smith, 22 Wis. 594; Ewell v. Greenwood, 26 Iowa, 377. And in Higbee v. Camden etc., 4 C. E. Green, 276, it is said that a bill by private individuals is a proper remedy so far as the injury to complainants is a personal or peculiar injury, and not one shared by them in common with the public, but no further. But see, *contra*, Whitfield v. Rogers, 26 Miss. 84.

[3] Hinchman v. Paterson etc., 2 C. E. Green, 75.

[4] Allen v. Board etc., 2 Beas. 68.

[5] Earl of Ripon v. Hobart, 3 Myl. & K. 169; Hamilton v. New York etc., 9 Paige, 171.

[6] Attorney General v. Johnson, 2 Wils. Ch. 87; Attorney General v. Forbes 2 Myl. & Cr. 123.

will not suffice that the person complaining merely shows a violation of his rights, and he must show such a violation as is or will be attended with serious damage.[1]

§ 523. A public nuisance can not exist in acts warranted by law or authorized by legislative sanction, even though the act complained of might, independent of statute, be a nuisance.[2] Nor will a charge in the bill of special and peculiar injury to the complainant avail, if the work sought to be restrained is authorized by legislative enactment.[3]

[1] Bigelow *v.* Hartford etc., 14 Conn. 565. This was a bill in equity brought by the owner of buildings and land above a causeway which had been swept away to restrain defendant from rebuilding the causeway. It appearing that no special injury was threatened to complainant's right, and that the injury and inconvenience resulting to him from the erection of the causeway would be small and not capable of appreciation, it was held that the injunction ought to be refused. Storrs, J., says: "Of whatever character it is requisite that the injury complained of should be, in order to lay the foundation for this remedy, it is necessary that it should be a substantial and not merely a technical or inconsequential injury. There must not only be a violation of the plaintiff's rights, but such a violation as is, or will be, attended with actual and serious damage. Even although the injury may be such that an action at law would lie for damages, it does not follow that a court of equity would deem it proper to interpose, by the summary, peculiar and extraordinary remedy of injunction. Spencer *v.* London and Birmingham Railway Company, 8 Simons, 193. It is obviously not fit that the power of that court should be invoked, in this form, for every theoretical or speculative violation of one's rights. Such an exercise of it would not only be wide from the object of investing those courts with that power, but would render them engines of oppression and vexation and bring them into merited odium. It is a power which is extraordinary in its character, and to be exercised generally only in cases of necessity, or where other remedies may be inadequate, and even then with great discretion and carefulness. It is a salutary, and indeed a necessary power when confined within those safe limits in which it has been exercised; but capable of being made an instrument of oppression, and therefore to be extended, if at all, with great circumspection. Earl of Ripon *v.* Hobart, 3 Mylne & Keene, 169."

[2] McFarland *v.* Orange etc., 2 Beas. 17; Hinchman *v.* Paterson etc., 2 C. E. Green, 75; Hogencamp *v.* Same, Ib. 83; Rex *v.* Pease, 4 B. & A. 30. And see Bordentown etc. *v.* Camden etc., 2 Harr. 314; Davis *v.* Mayor etc., 14 N. Y. 506; Attorney General *v.* Conservators etc., 1 Hem. & M. 1; Attorney General *v.* Metropolitan etc., Ib. 313. But see, *contra*, Le Clercq etc., *v.* Trustees etc., 7 Ohio, 218.

[3] Hogencamp *v.* Paterson etc., 2 C. E. Green, 83.

§ 524. The erection of a foundation wall as a support for a building in such manner as to obstruct the natural flow of water in a river flowing through a city, thereby contributing to the overflow of the banks in high water, is a public nuisance, which will be enjoined at the suit of the city corporation.[1] And the owners of adjacent lots are entitled to an injunction against the obstruction of a square dedicated to public use;[2] or the bill may be filed by the corporate authorities of the town, with whom may be joined private citizens affected by the nuisance.[3]

§ 525. Equity will not restrain the continuance of a public nuisance merely because it contravenes the general policy, in the absence of any violation of private right. An injunction will therefore be withheld against the perpetration of an act prohibited by public statute, the only ground urged for the relief being the diminution of the profits of a trade or business pursued by complainant in common with others.[4]

§ 526. The only ground on which the obstruction of a navigable creek can be enjoined is the hindrance to navigation, and where the stream is not in fact navigated, and has not been for many years, the injunction will be denied.[5] But the fact that criminal proceedings are pending for the abatement of the nuisance will not prevent the interference of equity. Thus, the proprietor of a mill dam, the back water from which constitutes a nuisance, may be enjoined on behalf of the people, pending an indictment against him for the same offense, where the right of the public is clear and the injury irreparable.[6]

[1] Rochester *v.* Erickson, 46 Barb. 92.

[2] Williams *v.* Smith, 22 Wis. 594; LeClercq etc. *v.* Trustees etc., 7 Ohio, 218; Trustees etc. *v.* Cowen, 4 Paige, 510.

[3] Trustees etc., *v.* Cowen, 4 Paige, 510. And see further, as to joinder of corporate authorities and private citizens to enjoin a public nuisance, Mayor etc. *v.* Bolt, 5 Ves. 129.

[4] Smith *v.* Lockwood, 13 Barb. 209.

[5] Gilbert *v.* Morris etc., 4 Halst. Ch. 495.

[6] Attorney General *v.* Hunter, 1 Dev. Eq. 12. And see further as to injunction of a nuisance pending an indictment for the same offense, People *v.* St. Louis, 5 Gilm. 351.

§ 527. In considering the subject of injunctions to restrain private nuisances, we have seen that twenty years adverse user and possession under a claim of right constituted an effectual bar to the exercise of the jurisdiction.[1] The rule does not, it would seem, prevail in cases of public nuisance, and it is held that no period of use or occupancy, however extended and uninterrupted, or under whatever claim of right, will prevent a court of equity from restraining the perpetuation of such a nuisance by additions and repairs.[2]

V. Roads and Railways.

§ 528. Injunctions allowed against obstruction of highway where complainant is specially injured.
529. The same.
530. Railroad not a nuisance *per se*.
531. Court of equity will not assume functions of a jury.
532. Of parties.
533. Private person seeking injunction against street railway must show special injury.
534. Construction of railway by private citizen, when enjoined.

§ 528. The remedy by injunction is the most efficient means of preventing obstructions to public highways, and where the facts are easy of ascertainment and the rights resulting therefrom free from doubt, the relief will be granted at the suit of a citizen having an immediate and special interest in the matter.[3] And the obstruction of a street, by building a house thereon, is a public nuisance which may be restrained by adjacent lot owners who suffer a special injury from the obstruction.[4] It is to be noticed, however, that the rule requiring complainants to show a special injury peculiar to themselves and distinct from the general inconvenience experienced by the public, is inflexible,[5] and where they fail

[1] *Ante*, § 507.
[2] Rochester *v.* Erickson, 46 Barb. 92.
[3] Green *v.* Oakes, 17 Ill. 249; Craig *v.* The People, 47 Ill. 487.
[4] Corning *v.* Lowerre, 6 Johns. Ch. 439.
[5] Id.

to show such injury, and own no property fronting on the street, the relief will be withheld, even though they be residents and tax payers.[1] And the fact of one's traveling the road frequently and being greatly inconvenienced by its obstruction, will not authorize the injunction in the absence of any special injury.[2]

§ 529. Even though the persons injured might have lain by until the completion of the road and then recovered damages for injuries sustained, equity will still interfere by injunction where the public officers having charge of the road are proceeding illegally and improperly, and where the interference is necessary to prevent a multiplicity of suits.[3] But proof of special injury to complainants will not, of itself, suffice to warrant an injunction, and the court will require, as in the case of trespass, that irreparable damage be shown, and where this does not appear the relief will be withheld, even though the persons aggrieved show a special and personal injury.[4] So, too, the court will refuse to interfere where the obstruction is not necessarily a nuisance *per se*, but something which may or may not be, according to circumstances. In such case an injunction will not be allowed until the matter has been determined by a jury.[5] And a supervisor of highways, as such, can have no injunction to restrain obstructions to a highway.[6]

§ 530. With regard to the interference of equity in restraint of public nuisances resulting from railroads, it is to be noticed in the first place that the erection of a railway and the running of cars through the streets of a city or village do not, *per se*, constitute such a nuisance as will be enjoined in the absence of proof that the railroad is a nuisance in fact.[7]

[1] McCowan *v.* Whitesides, 31 Ind. 235; Davis *v.* Mayor, 4 Kern. 506; Dawson *v.* St. Paul etc., 15 Minn. 136.

[2] McCowan *v.* Whitesides, 31 Ind. 235.

[3] Mohawk *v.* Artcher, 6 Paige, 83.

[4] Fort *v.* Groves, 29 Md. 188; Zabriskie *v.* Jersey etc., 2 Beas. 314.

[5] Dunning *v.* Aurora etc., 40 Ill. 481; Lake View *v.* Letz etc., 44 Ill. 81.

[6] Putnam *v.* Valentine, 5 Ohio, 187.

[7] Lexington etc. *v.* Applegate, 8 Dana, 289; Hentz *v.* Long Island etc., 13 Barb. 646; Bell *v.* Ohio etc., 25 Pa. St. 161.

Nor will a general averment that the road is a flagrant nuisance suffice in the absence of facts proving it to be such.[1] And the fact that the change in the mode of travel thus induced in the street or thoroughfare may have had an injurious effect upon business or rents in such thoroughfare, affords no ground for relief.[2] And where a railroad is authorized by the terms of its charter to construct its road in a particular manner, or through a particular street, such construction, being authorized by law, is not a nuisance and will not be enjoined.[3] Even where the road is being built without authority of law, it will not be enjoined at the suit of one who owns no real estate over or adjoining which it is to pass, and who will not be specially injured by its construction.[4]

§ 531. Where the corporate authorities of a city are proceeding to open a street through the embankment of a railway, upon the ground that it constitutes a nuisance by obstructing the street, and the railway company, relying upon twenty years possession, enjoins the municipal authorities from proceeding, the right of the city being doubtful, it is not error to continue the injunction until a hearing upon the merits. The question being properly triable by a jury, a court of equity will not assume its functions and decide the issue in advance of a trial at law.[5]

§ 532. The interest in and use of public streets being *publici juris*, their appropriation to private or corporate use in the construction of a railway, without authority of law, and the obstruction thus caused to travel, constitute a public nuisance which may be enjoined on behalf of the people.[6] A city, however, in its corporate capacity, has not such an interest or property in the streets and public squares over

[1] Hentz v. Long Island etc., 13 Barb. 646.

[2] Lexington etc. v. Applegate, 8 Dana, 289.

[3] Currier v. West etc., 6 Blatch. 487; McFarland v. Orange etc., 2 Beas. 17.

[4] Currier v. West etc., 6 Blatch. 487; Davis v. Mayor etc., 4 Kern. 506.

[5] Mayor etc. v. Georgia etc., 40 Geo. 471.

[6] The People v. New York etc., 45 Barb. 73.

which a railway is built as to entitle it to an injunction restraining the erection of the road.[1] And the construction of a railroad through a city, by authority of the common council, will not be enjoined as a nuisance to adjacent property owners, the right of passage not being obstructed to the public for other purposes.[2]

§ 533. We have already seen that to warrant relief in equity by a private citizen against a public nuisance, some special injury must be shown aside from the general inconvenience to the public.[3] In other words, damage sustained in common by all the individuals of a large class, furnishes no foundation for relief on the part of a single individual of that class. The rule applies with equal force in the case of railways, and the construction of a street railway will not be enjoined at the suit of an adjacent lot owner, who simply owns up to the line of the street, and over whose land the road does not pass, where no special damage is shown to the complainant different from that to all the property owners.[4]

§ 534. Where one under contract with a railroad company which has failed to construct its road, has gone on with the construction of a portion of the route for his own benefit, he may be restrained on the application of owners of land through which the road passes.[5] And the fact that complainants in the bill in equity are plaintiffs in an action at law then pending against other parties, to recover damages for past trespasses thus incurred, affords no defense to the bill.[6]

[1] Milwaukee v. Milwaukee etc., 7 Wis. 85.
[2] Drake v. Hudson etc., 7 Barb. 508.
[3] *Ante*, § 522.
[4] Osborne v. Brooklyn, 5 Blatch. 366.
[5] Stewart and Foltz's Appeal, 56 Pa. St. 413.
[6] Id.

VI. Bridges.

§ 535. Erection of bridge, when enjoined in United States courts.
536. Injunction not allowed where legal right is in doubt.

§ 535. The erection of a bridge over a large navigable river in such manner as to seriously obstruct the navigation of the river, is a public nuisance which will be enjoined in the courts of the United States, even though the erection be authorized by the legislature of a state.[1] And in such case the original jurisdiction of the Supreme Court of the United States will be exercised in behalf of a state bordering on the river, on the ground that the state, as proprietor of its public works, suffers a special injury from day to day by the erection of the bridge, which injury is not remediable at law and not susceptible of computation.[2] But a riparian proprietor will not be allowed to restrain the erection of a bridge by authority of a state legislature, where the injury which he would sustain would be consequential only, the bridge being a matter of great public convenience, a similar one having been in use for many years over the stream a short distance above.[3] Nor will the jurisdiction be exercised upon a mere possibility of injury,[4] nor

[1] Pennsylvania *v.* Wheeling etc., 13 How. 518; Baird *v.* Shore Line, 6 Blatch. 276. In the latter case, complainant came within the rule requiring special injury to be shown, he having vessels engaged in the navigation of the river. But the erection being afterward authorized by act of congress, the injunction was dissolved.

[2] Pennsylvania *v.* Wheeling etc., 13 How. 518, Taney, C. J., and Daniel, J., dissenting. But the relief has been denied where the corporate authorities of a city sought to restrain the erection of an aqueduct causing an obstruction to a navigable river, on the ground that they suffered no special injury to themselves different from the general injury to the public. Georgetown *v.* Alexandria etc., 12 Pet. 91.

[3] Gilman *v.* Philadelphia, 3 Wal. 713; the case distinguished from the Wheeling Bridge case, *supra*.

[4] Mohawk etc. *v.* Utica etc., 6 Paige, 554.

unless the evidence clearly shows that the bridge would be an obstruction to the navigation of the river.[1]

§ 536. Though the jurisdiction of equity is recognized to restrain the building of a bridge so near to one already existing under legislative authority as to lessen the profits from tolls, yet where the legal right is not clear, defendant as well as complainant professing to be acting under authority of the legislature, and it not being shown that the injury would be irreparable, the court will not interfere.[2] But where complainant's right to the free navigation of the river is clear, and the court is in doubt whether the bridge would be a material obstruction to navigation, a temporary injunction may be granted to prevent the great expenditure and loss which would result to the defendants if they were allowed to go on and erect the bridge before a hearing, and were then to be finally enjoined.[3]

[1] Hutchinson v. Thompson, 9 Ohio, 52. But see Silliman v. Hudson etc., 4 Blatch. 74, *infra*.

[2] Charles etc. v. Warren etc., 6 Pick. 376.

[3] Silliman v. Hudson etc., 4 Blatch. 74. This case on final hearing is reported in 4 Blatch. 395, before Nelson and Hall, J. J., and the judges being divided in opinion as to whether the injunction should be made perpetual, it was so certified to the Supreme Court of the United States, and upon the points so certified the judges of that court were also equally divided. See 1 Black, 582. The court below then decreed the dismissal of the bills, from which decrees appeals were had to the Supreme Court of the United States and upon hearing of the appeals the judges of that court were again equally divided. See 2 Wal. 403. As the result of this division the decrees of the Circuit Court were confirmed.

VII. Special Nuisances.

§ 537. Equity will not restrain a lawful business conducted in the ordinary way.
538. Right to lateral support will be protected by injunction.
539. Violation of burial ground may be restrained.
540. Of acts not nuisances *per se*.
541. Houses of ill fame may be enjoined.
542. Acquiescence and encouragement, effect of.
543. When injunction will be perpetuated.

§ 537. Where the injury complained of is such only as is incident to a lawful business conducted in the ordinary way equity will not interfere. Thus, an injunction has been refused against the injury and annoyance caused by the smoke from semi-bituminous coal used in the production of iron, it being used in the usual course of such business, and it appearing that greater injury would result from granting than from withholding the relief, and where such injury as might result could be adequately compensated in damages.[1] And where defendant disclaims the intention of continuing the nuisance, and is using due diligence for its removal, the injunction will be refused.[2] But the fact that the act threatened might be punished criminally as a nuisance will not prevent the exercise of the restraining power of equity.[3]

§ 538. The right to lateral support is regarded as an incident to the ownership of land, and its infringement has been considered as a nuisance which equity may enjoin. Thus, the removal and excavation of earth upon adjacent premises in such manner as to endanger the stability of complainant's soil and fences, by removing their lateral support, will be enjoined.[4] Whether a town does or does not receive such

[1] Richard's Appeal, 57 Pa. St. 105.

[2] King *v.* Morris etc., 3 C. E. Green, 397.

[3] People *v.* St. Louis, 5 Gilm. 351; Attorney General *v.* Hunter, 1 Dev. Eq. 12.

[4] Farrand *v.* Marshall, 19 Barb. 380; Same *v.* Same, 21 Barb. 409. In

special injury from obstructions to a stream caused by a railway corporation as to entitle it to an injunction, the relief will be refused until the question of whether the acts of the company are within their charter can be determined at law.[1]

§ 539. The trustees of a voluntary religious association may enjoin in behalf of their church the violation of a burial ground dedicated to the uses of the church by the owner of the soil; and in such a case the injunction will lie even against the holder of the legal title.[2]

§ 540. Equity will not lend its aid to enforce by injunction the ordinances of a municipal corporation restraining an act which is not shown to be a nuisance *per se*.[3] And where a body of commissioners, appointed by the executive authority of the state, and having no authority for the exercise of the powers of local legislation, attempt by an ordinance to abate as a nuisance that which is not a nuisance at common law, an injunction may be granted to restrain their action.[4]

§ 541. The general principles of equity with regard to nuisances and their restraint, apply to houses of ill fame, and the continuance of such houses may be restrained upon a bill filed by private persons, alleging that the close proximity of such nuisance deprives them of the comfortable enjoyment of their property and greatly diminishes its value.[5]

§ 542. As we have already seen, long-continued acquiescence in the erection of works may constitute a bar to relief in equity on the ground of nuisance.[6] The rule is extended even farther, and it is held that one party may so encourage

this case the opinion of the court, though somewhat *obiter*, would seem to imply that the doctrine is to be confined strictly to those cases where the owner of the land has not, by building or otherwise, increased the lateral pressure upon the adjoining soil; since, when the owner of the land has erected buildings upon the edge of his soil, he himself is regarded as in fault.

[1] Sheboygan *v.* Sheboygan etc., 21 Wis. 667.
[2] Beatty *v.* Kurtz, 2 Pet. 566.
[3] Mayor *v.* Thorne, 7 Paige, 261.
[4] Schuster *v.* Metropolitan etc., 49 Barb. 450.
[5] Hamilton *v.* Whitridge, 11 Md. 128.
[6] Wood *v.* Sutcliffe, 2 Sim. N. S. 163.

another in the erection of what he afterward complains of as a nuisance, as to give the adverse party a right to invoke the aid of equity to restrain proceedings at law for the recovery of damages resulting from the alleged nuisance.[1]

§ 543. At the final hearing upon bill and answer, if it is apparent from the pleadings that defendants are about to do some act charged in the bill, which if permitted would constitute a nuisance injurious to complainants, the preliminary injunction should be made perpetual.[2]

[1] Williams v. Jersey, 1 Cr. & Ph. 91.
[2] Attorney General v. Steward, 6 C. E. Green, 340.

CHAPTER XII.

OF INJUNCTIONS FOR THE PROTECTION OF EASEMENTS.

I. Leading Principles.
II. Easements in Light.
III. Easements in Water.
IV. Right of Way.

I. Leading Principles.

§ 544. Jurisdiction analagous to that in nuisance.
545. General rule; right by prescription.
546. Easement must be certain and violation of right clear.
547. Covenants against erections will be enforced.
548. Easement to support.
549. Right of burial.
550. Action of trespass.
551. Public squares.

§ 544. The general principles on which the jurisdiction of equity to restrain the violation of easements is based are similar to those which constitute the foundation of the relief against nuisances. Indeed, so closely allied are the two subjects that it is difficult to draw the line between what constitutes a violation of an easement and what a nuisance. In a generic sense every violation of an easement may be considered as a nuisance, though the converse of the proposition does not hold true. In both cases, to warrant the interposition of equity, an irreparable injury must be made to appear, which is not susceptible of adequate compensation in pecuniary damages, or which, from the nature of the case, would occasion a constantly recurring grievance, such as

loss of health, trade, business, or destruction of means of subsistence.[1]

§ 545. It may be stated as a general rule that where an easement or servitude is annexed or pertains to a private estate, either by grant, covenant or prescription, any encroachment upon its quiet enjoyment and exercise will be prevented by injunction.[2] Thus, where one has sold a lot adjoining his private residence on condition that it shall not be used in any manner offensive to the original owner, any violation of this covenant will be restrained.[3] And where the easement is acquired by prescriptive use for a long period of years, it is as much entitled to protection in equity as though resulting from grant or covenant.[4] So acquiescence for twenty years in defendant's use and enjoyment of the right will prevent complainant from enjoining such use.[5] But where the right or easement is based upon prescription, it must be shown to have been in exclusion of the rights of others. Thus, where complainant relies on twenty years adverse user and enjoyment of a fishery in a navigable river to restrain defendant from interfering with his easement by the erection of a wharf and running steamboats, the absence of an averment in the bill that such use was in exclusion of all others will be fatal to complainant's case.[6]

§ 546. To authorize the interference in this class of cases the easement should be itself certain and capable of being clearly ascertained, and there should be a clear and palpable violation of the right.[7] And where only a possible injury to complainant's easement is shown, as in the erection of a

[1] Webber *v.* Gage, 39 N. H. 182, and cases cited. See, also, chapter on nuisances, *ante*.

[2] Webber *v.* Gage, 39 N. H. 182; Seymour *v.* McDonald, 4 Sandf. Ch. 502; Hulme *v.* Shreve, 3 Green Ch. 116; Hills *v.* Miller, 3 Paige, 254; Trustees etc. *v.* Cowen, 4 Paige, 510.

[3] Seymour *v.* McDonald, 4 Sandf. Ch. 502.

[4] Hulme *v.* Shreve, 3 Green Ch. 116. And see Shreve *v.* Voorhees, 3 Green Ch. 25.

[5] Haight *v.* Morris Aqueduct, 4 Wash. C. C. 601.

[6] Delaware *v.* Stump, 8 Gill & J. 479.

[7] Olmsted *v.* Loomis, 6 Barb. 152.

wharf, where it does not appear that his property rights will be violated, and where such injury as may result can be remedied at law, an injunction will not be allowed.[1] Nor will the owner of real estate be restrained from making reasonable improvements, such as the erection of buildings, on the ground of endangering a neighboring edifice, if the owner of the adjacent premises possesses no special privileges protecting him from such erections, either by prescription or by grant from the person making the improvement, or from those under whom he claims title.[2]

§ 547. A covenant in a conveyance not to erect or permit the erection of any buildings on the premises of the grantor in front of the premises conveyed, is the grant of an easement, and the grantee is entitled to an injunction to restrain the owner of the servient estate from the erection of buildings in violation of his covenant.[3] And where the vendee of land has purchased upon the strength of representations made by the vendor that an alley should be established and perpetually maintained to a piece of land adjacent, even though the representations were not made in writing, the obstruction of such right of way will be perpetually enjoined.[4] So the grantee of real estate may be restrained from the violation of covenants on his part against erections upon the premises conveyed. And where real estate is sold with covenants by the grantee that no buildings shall be erected thereon, and passes through successive hands, the final owner in fee with notice of such covenants will be enjoined from violating the agreement by erecting buildings contrary to its terms.[5]

§ 548. The relief will be extended for the protection of an easement to support where defendant's acts tend to the destruction of the right. Thus, the owner of one-half of an ancient solid party wall has been enjoined from removing a

[1] Taylor v. Brookman, 45 Barb. 106.
[2] Lasala v. Holbrook, 4 Paige, 169.
[3] Hills v. Miller, 3 Paige, 254; Trustees etc. v. Cowen, 4 Paige, 510.
[4] Trueheart v. Price, 2 Munf. 468.
[5] Mann v. Stephens, 15 Sim. 377. And see Seymour v. McDonald, 4 Sandf. Ch. 502.

portion thereof and erecting a new wall on his own land at a distance of two inches from that left standing, the original wall having been long used for the support of buildings on either side.[1]

§ 549. The right of burial in a church yard, though conveyed by grant, is nevertheless considered as an easement rather than a title to the freehold, and an injunction will not be allowed the owner to prevent such disposal of the soil and removal of the remains interred therein as the court may have ordered on application of the officers of the church.[2]

§ 550. The owners of an easement will not be allowed to restrain the owner of the servient estate from proceeding in an action of trespass, where the grounds of defense to the action are partly legal and partly equitable, but the action at law will be allowed to proceed. In such case, if the legal grounds relied upon in defense are maintained in the action at law, no proceedings in equity are necessary; while if they are not sustained and it afterward becomes necessary for a court of equity to take cognizance of the equitable questions involved, the court will know what amount of damages has been assessed by the jury in the trial at law, and will thereby be better enabled to secure that which has been decided at law to be full compensation for the easement.[3]

§ 551. The right which it is sought to protect by injunction may result from a dedication of land to public uses, as well as from express grant or adverse possession. Thus, where land has been dedicated to the use of the public as a public square, the owners of lots adjoining the square who have purchased their lots and made improvements, relying upon such dedication to the public use, are entitled to the aid of equity to restrain the erection of private buildings on the square.[4] Nor will the original proprietors who have dedicated land to be used as a public square afterward be allowed

[1] Phillips v. Bordman, 4 Allen, 147.

[2] Richards v. Northwest etc., 32 Barb. 42.

[3] Barnard v. Wallis, 1 Cr. & Ph. 85.

[4] Rutherford v. Taylor, 38 Mo. 315. And see Brown v. Manning, 6 Ohio, 298.

to appropriate it to their own private use, and an adjacent lot owner is a proper party complainant to a bill in equity to enjoin such appropriation.[1] Such a complainant, being one of the inhabitants of the town and holding property contiguous to the square, is not a mere volunteer assuming to protect the rights of others, but is injured in his individual rights, and is entitled to the aid of equity to protect his own interests.[2] Where, however, the owners of adjacent lots sustain no injury to their individual rights, equity will not interfere. Thus, where a square has been conveyed to a county for the erection of public buildings and a court house, adjacent lot owners will not be permitted to restrain the county commissioners from leasing portions of the ground for private purposes, reserving the rent to the county, complainants in such case being regarded merely as volunteers having no personal interests to be protected.[3]

II. Easements in Light.

§ 552. Right to ancient lights will be protected.
553. Right to ancient lights by prescription not recognized in this country.
554. Lessor and lessee.
555. Land adjacent to canal.

§ 552. The right to the uninterrupted use of ancient lights long enjoyed is entitled to protection in equity. It is not, however, every deprivation of ancient lights that will authorize the interference by injunction, nor is the diminution of the value of the premises by the erection of buildings so as to darken one's windows, alone a sufficient ground, nor the fact that an action on the case would lie for the damages resulting from such diminution. To warrant the relief there must be

[1] Brown v. Manning, 6 Ohio, 298.
[2] Id.
[3] Smith v. Heuston, 6 Ohio, 101. And see Putnam v. Valentine, 5 Ohio, 187.

such material injury to the comfort of those dwelling in the neighboring house as requires the exercise of a preventive as well as a remedial power.[1] And where it is not shown that the obstruction of the light would cause a material injury to the comfort of complainant, the relief will not be granted.[2] Where an injunction is sought to prevent defendant from building over what is claimed to be a public highway in such

[1] Attorney General *v.* Nichol, 16 Ves. 338. The general principles underlying the jurisdiction of equity to interfere for the protection of easements in lights are well laid down by Lord Eldon in this case as follows: "The foundation of this jurisdiction, interfering by injunction, is that head of mischief alluded to by Lord Hardwicke, that sort of material injury to the comfort of the existence of those who dwell in the neighboring house requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be given in an action at law. The position of the building, whether opposite, at right angles, or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and can not erect without those mischievous consequences, which upon equitable principles should be not only compensated by damages, but prevented by injunction. * * * I repeat the observation of Lord Hardwicke, that a diminution of the value of the premises is not a ground; and there is as little doubt that this court will not interpose upon every degree of darkening ancient lights and windows. There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an action upon the case; which, however, might be maintained in many cases which would not support an injunction. These affidavits, therefore, stating only that the ancient lights will be darkened, but not that they will be darkened in a sufficient degree for this purpose, will not do."

[2] Wilson *v.* Cohen, Rice Eq. 80. It is often a matter of great difficulty to determine what amount of obstruction to light will authorize an injunction. The rule at law as to the degree of obstruction which is actionable is laid down in Back *v.* Stacey, 2 Car. & P. 465, substantially as follows: To constitute an illegal obstruction of light by building, it is not sufficient that plaintiff has less light than before, or that the part of his house affected can not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done. It may be difficult to draw the line, but a distinction must be drawn between a practical inconvenience and a real injury to the plaintiff in the enjoyment of the premises.

manner as to obstruct complainant's light and air, it will not be allowed if complainant fails to show a clear legal right, and shows no direct grant of way or of a right to light.[1]

§ 553. Although, as we have already seen, an easement or servitude may be created by prescription, yet in this country an exception is taken in the case of easements in light, and the English doctrine of sustaining a right to ancient lights and windows upon twenty years user does not prevail, and such user will not constitute sufficient ground for an injunction.[2] Nor will the fact that the eaves of a house project

[1] Biddle *v.* Ash, 2 Ashmead, 211.

[2] King *v.* Miller, 4 Halst. Ch. 559; Cherry *v.* Stein, 11 Md. 1. But see, *contra*, Robeson *v.* Pittenger, 1 Green Ch. 57. King *v.* Miller, 4 Halst. Ch. 559, was a bill for an injunction to restrain defendant from so building as to close up complainant's window in the gable end of his house, which he claimed was an ancient window. Complainant's house stood on the line of his lot. The injunction was denied, Halstead, Chancellor, saying: "The owner of a lot has the election to build on it as he pleases. The owner of the adjoining lot has the same right. If the one who builds first chooses to build on the line, the adjoining owner has no means of preventing it, and has no means of preventing the continuance of the building on the line. Where one has a right to put up a building on the spot where he erects it, and to continue it there, and the adjoining owner can do nothing to prevent its erection on that spot, and can do nothing to prevent its remaining there, it is simply absurd to say that the latter can by lapse of time lose his right to build up to his line. The loss of a right by lapse of time, from an act done and continued by another, can only be in cases where the party against whom the time is running has some means of preventing the act or its continuance. Where he has no such means, he is in no default, and can, therefore, lose no right. And a person by doing and continuing an act on his property which he has a right to do, and which another has no means of preventing, can acquire no right injurious to the property of that other." Cherry *v.* Stein, 11 Md. 1, was a bill to restrain defendant from erecting a wall in such manner as to darken and shut up the lights and windows upon one side of complainant's house, complainant relying on twenty years user. Eccleston, J., delivering the opinion of the court, denied the application of the English rule, saying: "Where A. makes a window in his own house, overlooking the open grounds of B., it is no infringement of the rights, or encroachment upon the property of the latter. * * And yet, under the English rule, if the window remains open and unobstructed for more than twenty years, B. can not afterwards erect a building on his own land, if it obstructs the light. To prevent such a consequence the rule does not give

over an adjoining lot so as to throw the water from the roof upon the lot, suffice to warrant an injunction where it does not appear that irreparable injury will follow.[1]

§ 554. As between lessor and lessee, it is held that the lessor will not, during the continuance of his lease, be allowed an injunction to restrain his lessee from darkening windows in the demised premises and obstructing light, where it is not shown that the injury is irreparable and not susceptible of compensation in damages.[2]

§ 555. The owner of land adjacent to a canal which is a public highway, is entitled to receive from it light and air, and equity will restrain one holding under the canal company from erecting a building over the canal in such manner as to close up complainant's windows and deprive him of the free enjoyment of this right.[3]

him any right of action or legal proceeding, but his only remedy is the seemingly ill-natured one of rendering the window of his neighbor useless, by building a wall or other obstruction for that purpose alone, if at the time he has no wish to build a house on his own property. And if the window be of considerable height the expense of obstructing it might be equivalent, or nearly so, to the value of the unimproved or vacant land designed to be protected. The effects and legal consequences resulting from the user of a way, and that of a light, are so essentially different, we do not perceive the propriety of holding that the twenty years rule which is applicable to the former should also be applied to the latter." And the court refused to sustain the injunction.

[1] Cherry *v.* Stein, 11 Md. 1.

[2] Atkins *v.* Chilson, 7 Met. 398, decided upon the authority of Ingraham *v.* Dunnell, 5 Met. 118, holding that an injunction will not lie to restrain an injury caused to a reversionary interest in an estate unless the injury will be irreparable, or, from its nature, not susceptible of adequate pecuniary compensation.

[3] Barnett *v.* Johnson, 2 McCart. 481.

III. Easements in Water.

§ 556. Easements in water, when protected; evidence.
557. Prescriptive right.
558. Equity will not interfere where the right is doubtful.
559. Acquiescence a bar to the relief.
560. Illustration of the rule.
561. Canals.
562. When relief will be withheld.
563. Grantor and grantee.
564. Owners in severalty.

§ 556. An easement or servitude in water is, under some circumstances, entitled to protection in equity, and an injunction will be granted in a proper case. Thus, riparian proprietors of a private stream, entitled to the use and enjoyment of the stream without diminution or alteration, will be protected by injunction from violation of their right.[1] And where mills are situated on both sides of a stream, if the mill owner upon one side attempts to deprive the other of his share of the water, a preliminary injunction may be granted, since the injury is likely to prove irreparable.[2] It is held, however, that complainant must first establish his rights at law, as well as a violation of those rights.[3] And where only a casual and occasional infringement of the right is shown, as by defendant's using more than his share of water for mill purposes, no suit at law having been brought to test the question of right, equity will withhold its interference, on the ground that no mischief is likely to ensue which can not be remedied at law.[4] The evidence upon which a court will perpetuate an injunction in this class of cases, must clearly establish the essential allegations of the bill, the burden of proof being on the complainant. And where the evidence consists only of the

[1] Society etc. *v.* Low, 2 C. E. Green, 19.
[2] Arthur *v.* Case, 1 Paige, 447.
[3] Bliss *v.* Kennedy, 43 Ill. 67.
[4] Norris *v.* Hill, 1 Mich. 202.

opinions of witnesses, there being great contrariety of opinion, it will not suffice to make an injunction perpetual.[1]

§ 557. An easement in water may be acquired by prescription, and when so acquired it is as absolute as any other right, and equity will restrain its violation where such violation is productive of serious injury.[2] Thus, where complainant has used and enjoyed a stream for his mill during a period of sixty years, without interruption, defendants owning land on the borders of the stream above may be enjoined from materially or sensibly altering or diverting the stream to the detriment of complainant's enjoyment.[3] So acquiescence for twenty years in defendant's adverse use of water which had previously flowed into complainant's mill pond, will prevent the obtaining of an injunction.[4] Nor will it avail complainant that there had been a three years reflow of the water into his pond, defendants not having intended to abandon their right during that time.[5] But, though complainant has been in possession twenty years, he will not be allowed, without first having established his right at law, to restrain the drawing off of water from a lake supplying his mill, by means of a subterranean channel created five years before.[6]

§ 558. Though equity will restrain the using of water to the injury of an easement, where the right is clear, it will not assume jurisdiction where the right is doubtful and the facts are not definitely ascertained.[7] And the use of water in a well upon one's own premises will not be enjoined because it is

[1] Woodruff v. Lockerby, 8 Wis. 369. This was a case where a preliminary injunction had been granted to restrain defendants from the erection of a mill in such manner as to deprive complainant of sufficient water for mill purposes.

[2] Hulme v. Shreve, 3 Green Ch. 116.

[3] Shreve v. Voorhees, 2 Green Ch. 25. But the injunction was retained only so far as was necessary to secure complainant in the use of his mill as he had before enjoyed it, without any material or sensible alteration, and was dissolved so far as it restrained defendants from erecting their mill on their own land and using the water for mill purposes.

[4] Haight v. Morris Aqueduct, 4 Wash. C. C. 601.

[5] Id.

[6] Reid v. Gifford, 6 John. Ch. 19.

[7] Roath v. Driscoll, 20 Conn. 533.

alleged that complainant is thereby deprived of water in his well, the facts not showing how he is thus deprived, the channel, if any, being underground.[1] So to warrant an injunction against obstructing the flow of water for a mill, the bill must show such obstruction to be unlawful; mere general allegations that defendant has obstructed the water of the stream, thereby preventing complainant's mill from running, and that he will continue to do so, will not suffice.[2] Nor will equity interfere to settle and adjust the respective rights of parties to the use of water, nor to determine how much each one is entitled to use, complainant not having established definitely what his rights are.[3]

§ 559. Where one has by his own acts consented to or acquiesced in the use of water in a particular manner, he will be estopped from afterward enjoining its use in that manner. Thus, where complainant without objection has stood by and allowed defendant to erect a mill in violation of the terms of his grant to defendant of the right to use the water in a particular manner, he is by his silence debarred from any relief against such diversion of the water.[4] And where defendants, relying upon a verbal assurance that they would be allowed to draw water for a mill from a lake whose outlet ran through complainant's land, have erected their mill without objection from complainant, he will not be allowed to enjoin the taking of water from the lake for the use of such mill.[5] So where one has permitted the use of water in a certain manner for twenty years, and has received compensation for such use, he will be estopped from relief by injunction.[6] Nor in such case is the insolvency of the defendant a sufficient cause for the interposition of equity, since insol-

[1] Roath v. Driscoll, 20 Conn. 533. The law of surface streams is inapplicable in such a case, and it is held that every man is entitled to the natural advantages of his own land, and that he could not know that the water supplying his well percolated through another's land.

[2] Patten v. Marden, 14 Wis. 473.

[3] Olmsted v. Loomis, 6 Barb. 152.

[4] Jacox v. Clark, Walk. Mich. 249.

[5] Payne v. Paddock, Walk. Mich. 487.

[6] Heilman v. Union etc., 37 Pa. St. 100.

vency, though often influencing the court, does not of itself authorize the injunction.[1]

§ 560. Upon similar principles it is held that long acquiescence on the part of the proprietors of a water power in a certain measurement of water to which defendants are entitled, will preclude the proprietors from obtaining relief by injunction against such measurement or use of the water, especially where erections have been made by defendants at considerable expense, which would be almost a total loss in case the injunction should be granted.[2]

§ 561. Where one is entitled to a water power supplied from a public canal, he can not by his own acts define or limit the rights of the canal company to the use of the water, and a perpetual injunction will be allowed against such an attempt.[3] And where a canal company is entitled to all the waters of a creek with which to supply its canal, it will not be enjoined from increasing the height of a dam which it has erected to turn the water into its canal, merely because a mill owner below the dam is deprived of water for his mill by thus increasing the height of the dam.[4]

§ 562. Where complainant, having conveyed his mill site, has no use for the water himself, but seeks an injunction evidently as a means of compelling defendant to make compensation for the use of the water, which might readily be had in an action at law, the relief will be withheld.[5] And an injunction will not lie to restrain lessees from the erection of works whereby water will be drawn off and used in a manner different from that specified in the lease.[6]

§ 563. Since the purchase of a right carries with it of necessity all the incidents and privileges connected with the right and necessary to its enjoyment, the purchaser of land on which stands the abutment of a mill dam is entitled to the

[1] Hilman v. Union etc., 37 Pa. St. 100.
[2] Blanchard v. Doering, 23 Wis. 200.
[3] Erie etc. v. Walker, 29 Pa. St. 170.
[4] Spangler's Appeal, 64 Pa. St. 387.
[5] Warne v. Morris etc., 1 Halst. Ch. 410.
[6] Society v. Butler, 1 Beas. 499, reversing the same case Id. 264.

same use of the water which had been enjoyed by his grantor, and a court of equity may enjoin the grantor from using or interfering with the water, or diverting it from grantee's mill.[1]

§ 564. As between parties who are owners in severalty of different mills situated upon the same mill dam and having the right to a certain portion of the water for the use of their respective mills, one of the parties may be enjoined from drawing off a portion of the water at a considerable distance above the dam. In such a case it is not essential that actual, perceptible damage should be shown, it being sufficient ground for equitable relief that there is a violation of the right by diverting the stream from its full and natural flow. And the fact that defendant is entitled to the use of the water for his dam below, does not authorize him to impair the flow of the stream by drawing off the water at a higher point.[2]

[1] Wall *v.* Cloud, 3 Humph. 181.

[2] Webb *v.* Portland etc., 3 Sumner, 189. Story, J., after stating that in actions of this nature it is not necessary to show actual, perceptible damage, a clear violation of the right being shown, observes: "But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage, that would furnish no ground why a court of equity should not interfere and protect such a right from violation and invasion; for, in a great variety of cases, the very ground of the interposition of a court of equity is, that the injury done is irremediable at law; and that the right can only be permanently preserved or perpetuated by the powers of a court of equity. And one of the most ordinary processes to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose I need not state, as the elementary treatises fully expound them. If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiffs, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs. A court of equity will not indeed entertain a bill for an injunction in case of a mere trespass fully remediable at law. But if it might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill."

IV. Right of Way.

§ 565. General rule.
566. Injunction not allowed pending action to determine the right.
567. Effect of statute.
568. Right acquired by prescription.
569. Verbal permission.

§ 565. Equity will protect the enjoyment of a right of way over a street or road by restraining the erection of obstructions thereon, the interference being based upon the irreparable injury to the person aggrieved.[1] But the facts showing such irreparable injury must be stated in the bill, and mere general allegations will not suffice.[2] Where, however, complainant alleges a prescriptive right of way over defendant's land to a public road and a market, and that he has no other means of outlet except a circuitous and inconvenient route, he makes out a sufficient case of irreparable mischief to entitle himself to an injunction.[3] A clear and undoubted right should be shown to warrant the exercise of the jurisdiction, and if the right be doubtful a decree will be withheld until it is established at law.[4] Even though the right of way be admitted and its obstruction be also admitted, the court will not therefore interfere to restrain such obstruction, but may in its discretion refuse the relief.[5]

§ 566. By analogy to the rule that equity will not interfere to restrain a trespass pending a trial at law to determine the right, where no irreparable injury is shown, in the absence of such injury it will not enjoin an obstruction of a right of way pending an action at law to determine the right.[6] And in such case the mere allegation in the bill of irremediable

[1] Roman v. Strauss, 10 Md. 89.
[2] Id. And see Amelung v. Seekamp, 9 Gill & J. 468.
[3] Shipley v. Caples, 17 Md. 179.
[4] King v. McCully, 38 Pa. St. 76.
[5] Clack v. White, 2 Swan, 540.
[6] Amelung v. Seekamp, 9 Gill & J. 468.

damage will not suffice, but the facts must appear which show that the apprehension of such injury is well founded.[1]

§ 567. Where a statute forbids the granting of injunctions against the erection or use of public works until the question of damages has been decided by a court of common law, an injunction will not be allowed a claimant of a right of way over land regularly appropriated by a city for public purposes, where no proceedings at law have been instituted.[2]

§ 568. A right of way may be acquired by prescription which will be protected in equity.[3] And a bill alleging a right of way over adjacent premises confirmed by forty years use, and which defendants have obstructed and destroyed, contains sufficient equity to warrant an injunction. The injury in such case is considered as not susceptible of reparation in damages, and one whose continuance must work a constantly-recurring grievance, as well as an interruption to the quiet and long-continued enjoyment of the easement annexed to complainant's private estate.[4]

§ 569. Where the owner of land has given verbal permission for the construction of a road or right of way through a portion of his premises, the grantee of such privilege or easement will not be restrained from exercising it merely because the owner of the premises has changed his mind and desires to revoke the privilege.[5]

[1] Amelung v. Seekamp, 9 Gill & J. 468.
[2] Wolbert v. Philadelphia, 48 Pa. St. 432.
[3] Shipley v. Caples, 17 Md. 179; Webber v. Gage, 39 N. H. 182.
[4] Webber v. Gage, 39 N. H. 182.
[5] Lexington etc. v. Ormsby, 7 Dana, 276.

CHAPTER XIII.

OF INJUNCTIONS FOR THE PROTECTION OF FRANCHISES.

I. Grounds of the Relief.
II. Roads and Railways.
III. Bridges.
IV. Ferries.
V. Special Cases.

I. Grounds of the Relief.

§ 570. General rule.
571. Right need not be established at law.
572. Relief analogous to that in cases of nuisance.
573. Right must be coupled with possession.
574. Negligence a bar to the relief.

§ 570. The violation of franchises or special privileges conferred by legislative authority either upon individuals or upon corporations, affords frequent occasion for invoking the extraordinary aid of equity by way of injunction to remedy evils which the usual modes of redress in courts of law are powerless to mitigate or to prevent. The value of a franchise being generally dependent upon its exclusive use and possession, it may be protected upon the ground of the inadequacy of the legal remedy and the probability of thus avoiding a multiplicity of suits. Where, therefore, the owner of the franchise is in actual possession and his title or right is not disputed, an injunction is the proper remedy for protecting him in the exercise of the exclusive privilege granted him by statute.[1]

[1] Piscataqua etc. v. New Hampshire etc., 7 N. H. 35; Hartford etc. v. East Hartford, 16 Conn. 149; Enfield etc. v. Hartford etc., 17 Conn. 40; Gates v. McDaniel, 2 Stew. 211; Lucas v. McBlair, 12 Gill & J. 1;

§ 571. To warrant the interposition of equity for the protection of franchises it is not necessary that the owner of the franchise should have first established his right by action at law. The legislative power of the state having authority to grant the exclusive right which it is sought to protect, the granting of such right is regarded as equivalent to having established it at law.[1] And where defendants are in the actual possession of a franchise or privilege granted them by legislative authority, they will not be restrained in the exercise of such privilege at the suit of persons having no particular rights of their own, save a general right common to every citizen and which it is claimed the franchise violates.[2]

§ 572. In a general sense the relief afforded by courts of equity against the invasion of a franchise may be regarded as akin to that which is extended in cases of nuisance, and the violations of right in the two classes of cases are closely analogous. And where the legislature has conferred an exclusive privilege or franchise, and the persons accepting it have long been in the exercise and enjoyment of all the rights thereby conferred and have performed the duties imposed, any acts which tend to disturb them in their rights and to dispossess them of their franchise are in legal contemplation a nuisance, the only safe and adequate remedy for which is by recourse to equity.[3]

McRoberts *v.* Washburne, 10 Minn. 23; Croton etc. *v.* Ryder, 1 Johns. Ch. 611; Livingston *v.* Ogden, 4 Johns. Ch. 48; *In re* Vanderbilt, Ib. 57; Ogden *v.* Gibbons, Ib. 150, affirmed 17 Johns. 488; Newburgh etc. *v.* Miller, 5 Johns. Ch. 101; North etc. *v.* Hoffman, Ib. 300; Livingston *v.* Van Ingen, 9 Johns. 507; Auburn etc. *v.* Douglass, 12 Barb. 553; Boston etc. *v.* Salem etc., 2 Gray, 1.

[1] Moor *v.* Veazie, 31 Maine, 360; Piscataqua etc. *v.* New Hampshire etc., 7 N. H. 35.

[2] Lansing *v.* North River etc., 7 Johns. Ch. 162.

[3] Newburgh etc. *v.* Miller, 5 Johns. Ch. 101; Boston etc. *v.* Salem etc., 2 Gray, 1; Boston etc. *v.* Boston etc., 16 Pick. 512. The same principle is recognized in Central etc. *v.* Lowell, 4 Gray, 474, though the injunction was refused on other grounds. In Newburgh etc. *v.* Miller, 5 Johns. Ch. 101, the rule is broadly stated that where one has the exclusive right to operate a ferry, bridge, or road, the erection of another ferry, bridge, or road so near the first as to cause an injurious competition is considered as a nuisance to the franchise which equity will perpetually enjoin.

§ 573. A distinctive feature of the relief in this class of cases is that the right for whose protection the aid of equity is invoked must be coupled with possession. While, therefore, courts of equity will entertain jurisdiction to prevent any unauthorized interference with a franchise where the person seeking relief is in actual possession, yet if possession be wanting the injunction will be withheld.[1]

§ 574. He who seeks an injunction for the protection of a franchise must be free from negligence in order to entitle himself to the relief. And where he has negligently failed to perform certain conditions annexed to the granting of his franchise by the legislative power, he will not afterward be allowed to enjoin the performance of those conditions by others authorized so to do by act of legislature.[2]

II. Roads and Railways.

§ 575. Franchises in roads will be protected.
576. Road enjoined may be either public or private.
577. Injunction allowed where injury is only a trespass.
578. Complainant must be diligent in assertion of his right.
579. Actual injury to the franchise must exist.

§ 575. Frequent instances of the interference of equity to prevent the violation of a franchise occur in the case of roads, as where the exclusive right to control and operate a highway, turnpike, or other road, has been granted to individuals or to corporations. Where the right conferred by the legislature is in exclusion of the right of all other persons to construct and operate such a road and to receive tolls therefrom, courts of equity, regarding any encroachment upon or violation of such exclusive right as a nuisance to the franchise, will interfere for its protection and will restrain the use of the rival road.[3] Thus, where complainant's road is incorporated under an act

[1] Enfield etc. v. Connecticut etc., 7 Conn. 51.
[2] Id.
[3] Newburgh etc. v. Miller, 5 Johns. Ch. 101.

of legislature, which provides that no other road shall be constructed within thirty years after the passage of the act, the act being held constitutional, is regarded as creating a contract with the corporation and an injunction will be allowed against the operation of a rival road.[1]

§ 576. The exercise of the jurisdiction is entirely independent of the question as to whether the road which it is sought to enjoin as a violation of complainant's franchise, has or has not the sanction of legislative authority, or whether it is a public or a private road. Thus, where certain persons, with a view to avoid payment of toll to a duly incorporated turnpike company, have established a by-road in such manner as to avoid the toll gate, they will be perpetually enjoined from using such road themselves, or from allowing others to use it.[2] Nor will a person be allowed to construct a road even upon his own land where it will result in allowing others to violate a franchise. Thus, where an incorporated company is operating a plank road and collecting toll in pursuance of its charter, an injunction will be allowed to restrain one who is opening and working a road on his own land in such manner as to enable travelers to shun the toll gate and thus violate complainant's franchise.[3]

§ 577. Though such injuries to a franchise as call for the interposition of equity and the granting of an injunction are generally in the nature of nuisances, and though the jurisdiction of equity over such cases partakes largely of the nature of the jurisdiction in restraint of nuisance, yet the relief may be granted where the injury to the franchise is purely a trespass, if the remedy at law is inadequate. And the destruction of toll gates and preventing the collection of tolls, though a trespass, is such a one as can not be adequately compensated in damages in an action at law, and it will therefore be enjoined in equity.[4]

[1] Boston etc. v. Salem etc., 2 Gray, 1; Boston etc. v. Boston etc., 16 Pick. 512. And see Central etc. v. Lowell, 4 Gray, 474.

[2] Croton etc. v. Ryder, 1 Johns. Ch. 611.

[3] Auburn etc. v. Douglass, 12 Barb. 553.

[4] Justices etc. v. Griffin etc., 11 Geo. 246.

§ 578. As in all cases where the preventive jurisdiction of equity is invoked for the protection of rights, he who seeks relief against a violation of franchise must make his application promptly and without delay and must use reasonable diligence in the assertion of his right. And where the grievance complained of consists in the construction of a road in such manner as to impair complainant's franchise, but defendants have been permitted for a long period to proceed with the construction of their work and to incur large expenditures without objection, the injunction will be withheld.[1]

§ 579. It would seem that actual injury to the franchise must exist before an injunction will be awarded, and that a mere apprehension of injurious results will not suffice if the work which it is sought to restrain may be undertaken for a legitimate purpose. And where complainants are by their charter vested with the exclusive franchise of transporting passengers and freight by railway between two cities, though they are entitled to the aid of equity to protect their franchise, yet a preliminary injunction will not be allowed to prevent two other corporations from effecting a union of their roads and forming a continuous line between the two points. The fact that such a junction may be used in derogation of complainants' rights will not warrant the interference, if there be another and a legitimate purpose for which it may be formed, since equity will not restrain the carrying out of undertakings having a legitimate object in view, merely because they may be perverted to unlawful purposes.[2] But where in such case it appears upon final hearing that complainants' rights are clear and unquestioned, and that they have been for more than thirty years in the enjoyment of their franchise of carrying passengers and freight between the two cities, an injunction will be allowed to prevent defendants from exercising the rights of complainants under their franchise to carry passengers through from city to city.[3] But it has been held that the franchise of a street

[1] South Carolina etc. *v.* Columbia etc., 13 Rich. Eq. 339.
[2] Delaware etc. *v.* Camden etc. 2 McCart, 1.
[3] Delaware etc. *v.* Camden etc., 1 C. E. Green, 321.

railway company does not entitle it to an injunction for the purpose of preventing another company from laying a double track through the same street, where it does not injure the first road or interfere with its running.[1]

III. Bridges.

§ 580. General rule.
581. Right need not be established at law.
582. Jurisdiction not dependent upon defendant's profits.
583. Landlord and tenant.
584. Injunction withheld where right is doubtful.
585. Negligence may bar relief.
586. The right must be exclusive.

§ 580. The exclusive right to construct and maintain bridges being a franchise dependent upon legislative grant, the general principles of the jurisdiction of equity for the protection of franchises extend to and cover cases of this nature. Where, therefore, the exclusive right to maintain a bridge and to collect toll is invaded and the owner's rights are infringed without constitutional authority, equity will enjoin such interference. The courts proceed in such cases upon the principle that the charter granting the franchise constitutes a contract between the public and the corporation, imposing certain burdens upon the corporation, which, when fulfilled, entitle it to protection in a court of equity.[2]

§ 581. As we have already seen, in considering the general grounds of the relief for the protection of franchises, it is not necessary that the right should have been first established at law to warrant a court of equity in extending relief by injunction, since the creation of the franchise by legislative grant in the first instance is regarded as a sufficient assertion of the legal right. And where persons have been granted by act of legislature the exclusive privilege of building and maintaining

[1] New York etc. v. Forty-second Street etc., 50 Barb. 285.

[2] Hartford etc. v. East Hartford, 16 Conn. 149; Enfield etc. v. Hartford etc., 17 Conn. 40.

a toll bridge over a river, their right is sufficiently established at law to entitle them to the aid of equity for its protection, and any infringement of that right by the erection of another bridge to the prejudice of the first will be enjoined.[1]

§ 582. The jurisdiction in this class of cases is exercised entirely independent of the question as to whether the persons against whom the injunction is asked derive profit from their interference with complainant's rights. And where defendant, a railway corporation, allows persons to cross its railway bridge free of toll, thereby impairing complainant's franchise in a toll bridge near at hand, an injunction will be granted to restrain the railway company from allowing its bridge to be used for the passage of any persons, vehicles, or animals for which complainant is entitled to take toll.[2]

§ 583. The relief may sometimes be allowed even though the relation of landlord and tenant exists between the parties as to the subject of the franchise to be protected. Thus, where complainants lease their bridge to defendants, who use it in a manner expressly forbidden by the terms of their agreement, thereby greatly injuring complainants in the rights retained by them, an injunction will be allowed against such improper use. In such case a court of equity proceeds upon the ground that defendants are guilty of maintaining a continual nuisance which can be best remedied by the preventive power of equity.[3]

§ 584. Where, notwithstanding the legislative grant of the franchise, the legal right is not sufficiently clear to enable the court to determine correctly, and where no irreparable mischief is alleged as likely to result from a continuance of the acts complained of, the court may very properly take into consideration the relative convenience and inconvenience to the parties by granting or withholding the relief, and be governed thereby in its determination. Thus, where one has received from parliament the right to construct and maintain a bridge, and

[1] Piscataqua etc. *v.* New Hampshire etc., 7 N. H. 35.
[2] Thompson *v.* New York etc., 3 Sandf. Ch. 625.
[3] Niagara etc. *v.* Great Western etc., 39 Barb. 212.

seeks to restrain a railway company from conveying its passengers across the river in steamboats, but does not show any injury likely to result from such acts which can not be adequately compensated in damages, the question of the respective rights of the parties being in doubt, an injunction will be withheld.[1] In such a case equity will hesitate to interfere, lest by granting the relief prayed it might pronounce an opinion in favor of the legal right before a trial at law, though it may require defendant to keep an account until the legal right can be determined, and leave will be given complainant to apply again for an injunction.[2]

§ 585. Negligence on the part of the owner of the franchise in performing the conditions on which he received his exclusive right, may deprive him of the aid of equity for its protection. And where a bridge company has been granted the right to erect and maintain a bridge, the charter requiring it to provide certain locks which it has made no effort to build, and by a subsequent act of legislature it is relieved from building the locks, it will not be allowed to enjoin defendants, who are proceeding under legislative authority, from constructing the locks.[3]

§ 586. An important principle to be observed in the exercise of the jurisdiction for the protection of franchises, is that the right which is the subject of legislative grant, and which it is sought to protect, must be exclusive in its nature. And where the grant of a franchise is not in terms a grant of an exclusive privilege, the government is presumed not to have intended to part with the exclusive right, but to retain it for the public benefit. Equity will not, therefore, lend its aid in such case for the protection of a right which was not intended to be exclusive.[4] Thus, complainants, whose right to erect and maintain a toll bridge and to receive the tolls is not in terms exclusive of all others, will not be permitted to enjoin

[1] Cory *v.* Yarmouth etc., 3 Hare, 593.

[2] Id.

[3] Enfield etc. *v.* Connecticut etc., 7 Conn. 51.

[4] Fall *v.* County etc., 21 Cal. 287. President etc. *v.* Trenton etc., 2 Beas. 46.

the opening of another bridge within such distance as to greatly impair the profits of the first.[1] Especially will the aid of equity be withheld in such case where it appears that complainants have so far appropriated their bridge to the use of a railway company, as to render it unsafe and dangerous for the ordinary purposes of travel for which it was originally constructed.[2]

IV. Ferries.

§ 587. General rule.
588. Relief not granted where remedy exists at law.
589. Complainant must be free from blame.
590. Modification of general rule.
591. Protection extended to land necessary for enjoyment of franchise.

§ 587. The right to maintain a ferry, being a franchise whose value lies in its exclusiveness, equity may enjoin any unauthorized interference with or interruption of such right, upon the ground of preventing multiplicity of suits.[3] So the erection of a bridge in such close proximity to a ferry whose franchise is created by law, as to endanger its profits and jeopardize the exclusive right of the proprietors of the ferry, constitutes sufficient ground to warrant a court of equity in granting an injunction for the protection of the franchise.[4] The rule is, however, to be accepted with the qualification that the right must be exclusive in its nature to entitle it to the protection of equity. And where complainants show no exclusive ferry privileges or franchise, they will not be allowed to enjoin the keeping of another ferry at the same place.[5]

§ 588. In the exercise of the jurisdiction for the protection of franchises, courts of equity will look into the question of whether relief may be had at law, and if it appears that the

[1] Fall v. County etc., 21 Cal. 237.
[2] President etc., v. Trenton etc., 2 Beas. 46.
[3] McRoberts v. Washburne, 10 Minn. 23.
[4] Gates v. McDaniel, 2 Stew. 211.
[5] Butt v. Colbert, 24 Tex. 355

remedy at law in damages is ample, an injunction will be refused.[1] Where, however, upon an amended bill complainant shows the exclusive right to a ferry, which is being violated by defendant, and shows his inability to procure proof so as to proceed with an action at law, he is entitled to restrain the infringement of his franchise, even though a former application had been refused on the ground that the remedy at law was ample.[2]

§ 589. He who seeks the aid of equity to restrain encroachments upon his franchise must himself be free from blame, since negligence and inattention to the business of his franchise and to the wants of the public will estop him from relief. Thus, where complainant claims the exclusive right to operate a ferry within certain limits, he will not be allowed to enjoin defendant from maintaining a ferry in violation of such right, where it appears from the evidence that complainant has been guilty of such a degree of inattention and gross carelessness as would warrant the forfeiture of his rights in a proper proceeding for that purpose.[3]

§ 590. Equity will only interfere for the protection of a franchise against those whose conduct as regards the general public is such as to impair the right of the owner of the franchise. In accordance with this principle, it has been held that private persons will not be enjoined at the suit of a ferry owner from using their own boats for the transportation of themselves and families, the public not being permitted to use them.[4] And it would seem that the proprietors of a ferry, even though they may not have forfeited their franchise, may by non-user deprive themselves of any right to relief in equity.[5]

§ 591. The owner of a ferry who has received his franchise by legislative grant, is entitled to the protection of equity to restrain the laying out of a public road through grounds

[1] Long v. Merrill, N. C. Term R. 112.
[2] Same v. Same, Ib. 256, 2 Murph. 339.
[3] Ferrell v. Woodward, 20 Wis. 458.
[4] Trent v. Cartersville etc., 11 Leigh, 521.
[5] Id.

adjoining his dock which have been used by him for a long period of years in connection with his ferry, and which are necessary for its beneficial use.[1]

V. Special Cases.

§ 592. Proceedings of public officers, when enjoined.
593. Tax upon franchise, when enjoined.
594. When injunction will issue as a matter of private right.
595. Franchise must be exclusive to be protected.
596. Public lottery entitled to protection by injunction.
597. Written evidence of franchise must be produced.
598. Railway companies.
599. Where right is doubtful considerations of relative convenience and inconvenience will govern.
600. Exclusive right of navigating river.
601. Distinction between franchise and monopoly.

§ 592. While as a general rule the courts of the United States have no jurisdiction to restrain proceedings in the state courts,[2] they will grant an injunction against a public officer of a state to restrain him from such proceedings under a void statute of the state as are likely to destroy a franchise created by the United States.[3] If, however, the act complained of is a mere trespass for which adequate damages may be had at law, an injunction will not be allowed. Thus, a distraint by the treasurer of a county against the money and property of an incorporated bank for taxes, will not be enjoined upon the ground of the unconstitutionality of the tax, since if the act under which the tax was levied be unconstitutional, the officer enforcing it is a mere trespasser, and is liable in damages in an action at law.[4]

§ 593. The fact that a tax has been illegally imposed upon a franchise does not of itself constitute sufficient foundation

[1] Flanders v. Wood, 24 Wis. 572.
[2] Diggs v. Wolcott, 4 Cranch, 179.
[3] Osborn v. U. S. Bank, 9 Wheat. 738.
[4] Mechanics etc. v. Debolt, 1 Ohio St. 591.

for relief by injunction. In this respect a tax upon a franchise does not differ from a tax levied upon any other species of property, real or personal, and a court of equity is governed by the same principles in granting or withholding an injunction against taxation of a franchise as are applicable in all other cases where its aid is invoked to restrain the collection of revenues. If therefore the only equity in support of the bill is the illegality of the tax imposed, the proper remedy is at law, and an injunction will not be allowed.[1] If, however, the injury is so irremediable in its nature as to render the legal remedy inadequate to redress the wrong complained of, as if there is danger of the destruction of the franchise itself by the threatened enforcement of an unconstitutional tax, an injunction may properly be allowed.[2]

§ 594. Where parties are fraudulently possessed of the franchise of a corporation created by law, and are exercising its functions, a bill for an injunction will lie on behalf of the persons aggrieved as a matter of private right, and it is not necessary that proceedings be first had by the proper officer of the state to oust the corporation of its franchise.[3] And it is competent in such case for any number of the stockholders of the corporation to file a bill for an injunction.[4] But if no questions of private right are involved, the charge being of the usurpation of a franchise by a corporation assuming powers not within its charter, in direct contravention of a public statute, equity will not interfere by injunction, the proper remedy being by information in the nature of a *quo warranto*.[5]

[1] DeWitt *v.* Hays, 2 Cal. 463. And see Mechanics etc. *v.* Debolt, 1 Ohio St. 591, *supra*.

[2] Foote *v.* Linck, 5 McLean, 616; Woolsey *v.* Dodge, 6 McLean, 142. These cases are based upon Osborn *v.* U. S. Bank, 9 Wheat. 738, *supra*.

[3] Putnam *v.* Sweet, 1 Chand. 286.

[4] Id.

[5] Attorney General *v.* Utica Ins. Co., 2 Johns. Ch. 371. This was an information filed by the attorney general to restrain defendant, an insurance company, from conducting a banking business in violation of a statute prohibiting unincorporated banking associations. The injunction was refused, Kent, Chancellor, observing: * * * "The right of banking was, formerly, a common-law right, belonging to individuals,

§ 595. Since an exclusive franchise can not be implied from a legislative grant in the absence of express words whereby it is made exclusive, it follows that a legislature may rightfully create a franchise which will conflict with one previously created, if the first were not in express terms exclusive of all others. Thus, a railway company may be incorporated to run its road through the same valley with a navigable canal previously incorporated, but whose charter was not exclusive in its terms; and if the termini of the railway are such as to require it to cross the canal, it will not be restrained from the erection of bridges for that purpose.[1]

§ 596. Inadequacy of the remedy at law and the avoiding of a multiplicity of suits are strong grounds for the granting of injunctions to protect statutory privileges of an exclusive nature. And a franchise to carry out a lottery scheme for a public purpose is so far exclusive as to come within this rule and to be entitled to protection by injunction.[2] In such case the commissioners appointed by law to carry out the purposes

and to be exercised at their pleasure. But the legislature thought proper, by the restraining act of 1804, and which has since been re-enacted, to take away that right from all persons not specially authorized by law. Banking has now become a franchise derived from the grant of the legislature, and subsisting only in those who can produce the grant; if exercised by other persons, it is the usurpation of a privilege, for which a competent remedy can be had by the public prosecutor in the Supreme Court. I can not find that this court has any ordinary concurrent jurisdiction in the case. * * * The charge contained in the information savors, then, so much of a criminal offense, that it would require a clear and settled practice to justify the interference of this court, when that interference is not called for, in aid of a prosecution at law. The charge of an usurpation of a franchise has so frequently occurred, and the remedy by injunction is so convenient and summary, that the jurisdiction of this court would have been placed beyond all possibility of doubt, and have been distinctly announced, by a series of precedents, if any such general jurisdiction existed. But I have searched, in vain, for this authentic evidence of such a power. The precedents are all in the court of K. B., and Kyd cites nearly an hundred instances, within the last century, of informations filed in the K. B., to call in question the exercise of a franchise." And see same case § 23, *ante*, note 4.

[1] Tucakoe etc. *v.* Tuckahoe etc., 11 Leigh, 42.

[2] Lucas *v.* McBlair, 12 Gill & J. 1.

of the lottery are proper parties to institute an action in their own name to restrain a violation of the franchise committed to them; but the state is not a necessary party.[1]

§ 597. Where the existence of complainant's right or franchise depends upon a written instrument or contract, he will be required to produce such written evidence, or in default thereof to assign some satisfactory reason for his failure. If he omits to produce such evidence and fails to assign any satisfactory reason for such omission, he will not be allowed an injunction.[2]

§ 598. The construction of another railway company through the same streets included in a grant to a previous company, does not of itself constitute an infringement of the franchise granted to the prior company, nor is it such an encroachment upon its rights as, in the absence of special injury, will warrant the interference of a court of equity.[3] But where a railway company, without authority of law, is proceeding to extend its track, such unauthorized extension is regarded as the attempted exercise of a valuable franchise, which is of itself sufficiently injurious to warrant a decree for a perpetual injunction.[4]

§ 599. In case of doubt as to the actual legal right to the franchise in controversy, a court of equity will generally be determined in granting or withholding the injunction by considerations of the relative convenience and inconvenience to the parties in the cause. And if in such case the inconvenience seems to be evenly balanced, equity will leave the parties as they are until the right can be determined at law. Thus, where the owner of a bridge over a river, authorized by act of parliament, seeks to restrain a railway company from carrying its passengers across the river in steamboats, the question of the legal right being somewhat in doubt, an injunction will not be allowed in the absence of any allegations of irreparable mischief, or of such injury as can not be

[1] Lucas v. McBlair, 12 Gill & J. 1.
[2] Hankey v. Abrahams, 28 Md. 589.
[3] Brooklyn etc. v. Coney Island etc., 35 Barb. 364.
[4] People v. Third Avenue etc., 45 Barb. 63.

adequately compensated in damages at law.[1] The relief will also be refused under such circumstances lest equity may, by granting an injunction, pronounce an opinion in favor of the legal right before a trial at law. But the defendants may be required to keep an account, and complainant will have liberty to apply again for an injunction.[2]

§ 600. Legislative grants of the exclusive right of navigating rivers with steamboats have been a subject of judicial decision, and the authorities are somewhat divided as to whether a franchise of this character is entitled to protection by injunction. In the unsettled state of the authorities, it is difficult to deduce any other rule upon the subject than that the interference of equity in such cases is dependent upon the constitutionality of the grant and the right of the legislature to make such grant. Where the courts have regarded such acts as being within the scope of the legislative authority granting them, the franchise has been protected by injunction and violations of the exclusive privilege have been restrained.[3] And where an act of legislature has granted the exclusive right for twenty years of navigating a river with steamboats upon certain conditions which have been complied with, thus creating a contract, any interference with the right by opposing lines of steamers will be enjoined.[4] In such case the state being regarded as possessed of the necessary authority to make the grant, the exercise of that authority by conferring the franchise is deemed equivalent to having established the right at law.[5] Where, however, the courts have construed the legislation conferring such a franchise to be unconstitutional, they have denied the right to protection in equity.[6]

[1] Cory *v.* Yarmouth etc., 3 Hare, 593.

[2] Id.

[3] Livingston *v.* Ogden, 4 Johns. Ch. 48; In re Vanderbilt, Ib. 57; Ogden *v.* Gibbons, Ib. 150, affirmed 17 Johns. 488; North River etc. *v.* Hoffman, 5 Johns. Ch. 300.

[4] Moore *v.* Veazie, 31 Maine, 360.

[5] Id.

[6] Gibbons *v.* Ogden, 9 Wheat. 1; North River etc. *v.* Livingston, 3 Cow. 713.

§ 601. A distinction has been drawn between a franchise proper, granted by legislative authority upon adequate consideration, where the owner of the franchise is bound to the performance of certain obligations toward the public, and a mere monopoly of an ordinary branch of trade, over which the government has no exclusive prerogative, and where no consideration either of a public or private character is reserved for the grant. And while, as we have seen, the jurisdiction by injunction is freely exercised for the protection of franchises, the grant by the government of a monopoly in the exercise of an ordinary business over which the government has no control, without any consideration and to the exclusion of all others desiring to engage in such business, will not be protected by injunction. Thus, where by an amendment to the charter of a gas company authorizing it to lay its pipes through the streets and public grounds of a city, it is provided that the right shall be exclusive except as against such other persons as may be authorized by legislature, such provision is held to constitute a monopoly which is not entitled to protection in equity and an injunction will not be allowed to prevent another company from laying down its gas pipes.[1] Nor will the fact that pending the controversy

[1] Norwich etc. *v.* Norwich etc., 25 Conn. 19. The distinctions between a franchise, such as is entitled to the protection of equity, and a mere monopoly of a particular trade or branch of business, are clearly defined in this case, which may be regarded as the leading American case upon the subject. The complainant, the Norwich Gas Light Company, sought to enjoin the Norwich City Gas Company from distributing gas through the streets of the city, and from any further use of the streets for that purpose. Complainant's right to relief rested upon an amendment to its charter which provided as follows: "The right of the Norwich Gas Light Company to lay down gas pipes, and to erect gas posts, burners and reflectors in and through the streets, alleys, lanes, avenues and public grounds of the city and town of Norwich, and to distribute gas through the same for the purpose of lighting said streets, lanes, alleys, avenues, or public grounds, and the stores, dwellings, and other buildings situated thereon, is and is hereby declared to be exclusive, as against any and all persons or corporations, except such persons or corporations as may hereafter be invested by the general assembly of this state, with power to use said streets, lanes, alleys, avenues, and public grounds for the same purpose. *Provided*, that nothing in this act contained shall prevent any

complainants have bought a parcel of land so situated with reference to the public highway that defendants are obliged to

individual, corporation, or society from making or using gas on their own premises, and that the price of gas manufactured by said Norwich Gas Light Company shall at no time exceed four dollars per thousand cubic feet." Hinman, J., delivering the opinion of the court, used the following language with reference to the exclusive right attempted to be conferred by the amendment to the charter above quoted: "Has then the amendment to the plaintiffs' charter the effect of conferring on them an exclusive property franchise, in the streets and public places in the city of Norwich, for the purpose of laying pipes through which to distribute gas? The plaintiffs insist that it has this effect, and they say it confers on them a franchise similar, in all respects, to the franchise which is sometimes granted to a ferry or bridge corporation, prohibiting any other ferry or bridge within certain specified limits. A franchise is defined by Blackstone to be a royal privilege or branch of the crown's prerogative, subsisting in the hands of a subject. Being derived from the government, it is always supposed to have been originally granted by the government. It is property which may be transferred by sale or devise, and it will descend to heirs like other property; and the owner has the same security for its protection, under the constitution, as has the owner of any other property. Enfield Toll Br. Co. *v.* Hartford & N. Haven R. R. Co., 17 Conn. R. 40. As this is a species of property derived by grant from the government, it follows that if the government has no power to make the grant, either because it is contrary to public policy, or because the government had no title to the thing granted, no title will be conveyed to the grantee. This grant appears to have been made without any consideration whatever for it. The plaintiffs are under no obligation to make gas, or to suffer the gas which they may make to be used. They are restricted in the price of what they do sell, but there is no provision that they shall sell to all, or to any who may apply for it, or to so many as they may be able to accommodate. In this respect there is a broad distinction between this and the grant of a bridge or ferry franchise. The most valuable interest in bridge and ferry grants is the right to take toll, and this right is never granted unless it is founded on an adequate consideration, which in the case of a ferry consists in an obligation to keep boats for the transportation of passengers, etc., and in the case of a bridge in erecting and keeping the bridge in repair, for the accommodation of all who may have occasion to use it. And we are told that the right of the crown to authorize the collection of tolls can not be imposed on the public, unless upon terms of this sort. 2 Steph. Bl. Com. 16. And if the right to tolls can not be granted, except upon the terms of an adequate consideration, in the facilities furnished to the public, ought the public, or any portion of it, to be deprived of the ordinary means of obtaining gas, unless the parties who claim an exclusive right to use

lay their main pipe through it, authorize an injunction in favor of complainants; their voluntary purchase of the land *pendente lite* does not entitle them under such circumstances

those means, are under an obligation to furnish it? Again, it is the duty as well as the prerogative of the government to provide necessary and convenient roads and bridges; and to enable it to accomplish this object, it has everywhere what is called 'the right of eminent domain;' the right over individual estates to resume them for this and other public purposes. Such a prerogative connected with a corresponding duty, with the power to execute it by the exercise of the right of eminent domain, necessarily implies that it belongs to the government to determine what improvements are of sufficient importance to justify the exercise of the right, and when and how it shall be exercised; and if a particular bridge, or ferry, is considered sufficient for a particular locality, it may stipulate that within such reasonable limits, the particular bridge or ferry tolls shall not be diminished by any other improvement of the sort. But it is no part of the duty of the government to provide the community with lights in their dwellings, any more than it is to provide them with the dwellings themselves, or any of the necessaries or luxuries which may be deemed important to the comfort or convenience of the community. And if it be assumed that there would be no impropriety in the lighting of the streets under the control and direction of the sovereign power, this would be merely as a regulation of police, or an incident to the duty to provide safe and convenient ways. And in this case the power to provide for lighting the streets is of no importance, because nothing was done to secure the object, unless the plaintiffs chose to assume it; and whether they would do so would probably depend upon whether it could be made profitable. As, then, no consideration whatever, either of a public or private character, was reserved for the grant, and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade, in respect to which the government has no exclusive prerogative, we think, that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes, can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the bill of rights, the first section of which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void. The statute of 21 James I., C. 3, which declares such monopolies to be contrary to law and void, except as to patents for a limited time, and printing, the regulation of which was at that time considered as belonging to the king's prerogative, and except,

to the favorable consideration of a court of equity, and the injury, if any, can be compensated by damages in an action of trespass.[1]

also, certain warlike materials and manufactures, the regulation of which for obvious reasons may fairly be said to belong to the king, has always been considered as merely declaratory of the common law. 4 Bacon's Abr. p. 764, Tit., Monopoly; 4 Blk. Com. 160; Hindmarch on Patents, chap. 2, p. 7, *et seq.* A monopoly, in the sense which this exclusive grant may be said to be such, is defined by Bouvier as 'an institution or allowance by a grant from the sovereign power of the state, by commission, letters patent, or otherwise, to any person or corporation by which the exclusive right of buying, selling, making, working or using of anything is given.' While then we are not called upon to question the authority and power of the legislature to grant to the plaintiffs the right to lay down their own pipes for the distribution of gas through the streets for their own private purposes, we think, considering that the streets, subject to the public easement, are private property, that it does not possess the power to exclude others from using them for similar purposes. And while we do not question its power to provide that the breaking up of the streets for this or other purposes shall be a public nuisance, we do not think the plaintiffs have such a special interest in the streets as will enable them to ask for an injunction against it. As was remarked in the case against the Sheffield Gas Consumers' Company, above cited, the plaintiffs, having acquired a right to lay their pipes in the streets, are, in truth, seeking through this medium a higher and better right—a right to preclude all others from laying down their pipes. This, we think, they are not entitled to do."

[1] Norwich etc. *v.* Norwich etc., *supra.*

CHAPTER XIV.

OF INJUNCTIONS AGAINST THE INFRINGEMENT OF PATENTS.

I. NATURE AND GROUNDS OF THE JURISDICTION.
II. EFFECT OF PRIOR ADJUDICATIONS.
III. CONSIDERATIONS GOVERNING THE COURT IN GRANTING THE RELIEF.

I. NATURE AND GROUNDS OF THE JURISDICTION.

§ 602. Object of the relief; the forum.
603. Judicial discretion; conditions imposed.
604. Not essential that right be established at law.
605. Province of the writ; relative convenience and inconvenience.
606. Right of patentee must be free from doubt.
607. Controversy as to the right will bar relief.
608. The presumptions necessary to warrant an injunction.
609. Acquiescence by the public; exclusive enjoyment.

§ 602. The jurisdiction of courts of equity to restrain the infringement of letters patent for inventions, is exercised for the prevention of irreparable injury, vexatious litigation and a multiplicity of suits, as well as for affording protection to the rights of inventors.[1] The right to interfere by injunction in this class of cases is, in this country, exercised only by the United States courts, the state courts being devoid of jurisdiction.[2] And the preventive relief by injunction is granted in aid of the legal right whose protection is the ultimate object sought.[3]

[1] 2 Story's Eq. § 930.
[2] Parkhurst v. Kinsman, 2 Halst. Ch. 600.
[3] Bacon v. Jones, 4 Myl. & Cr. 436.

§ 603. Substantially the same rules prevail in determining applications for preliminary injunctions in patent causes as in other equitable cases, and the granting of the relief is a matter of sound judicial discretion, to be determined by the circumstances of the case, and where much greater injury is likely to result to complainants from withholding the relief than to defendants from granting it, it may be allowed.[1] And while the granting of preliminary injunctions is always a matter of judicial discretion, a somewhat wider latitude is allowed the court in the exercise of this discretion where the jurisdiction is invoked against the infringement of patents than in ordinary cases. Thus, the court may impose conditions upon the parties, either for granting or refusing the relief, and may examine into the state of the litigation, the nature of the improvement and the extent of the infringement, as well as the comparative inconvenience to the parties.[2]

[1] Irwin *v.* Dane, 4 Fish. 359. "The granting of a preliminary injunction," says Blodgett, J., "is a matter of judicial discretion to be determined by the circumstances under which the case is presented, and inasmuch as in this case I think that much more injury would or might result to the complainants from a refusal of the injunction than to the defendants by granting it, I have concluded to grant it. The aspect of the case is simply and briefly this: The complainants are the owners of patents, and are manufacturing under them; have entered upon the manufacture of the patented article largely, and engaged in it for over three years. The defendants had, just prior to the commencement of this suit, also entered upon the manufacture of the competing article, but, according to the proofs, have invested very little money in it; had acquired no reputation for their manufacture in that line, although in other branches of their business they are largely engaged. I think that they can better afford to await the issue of the controversy here, than even to take the chances of the result of a trial, and perhaps be called on to respond in damages."

[2] Furbush *v.* Bradford, 1 Fish. 317. The court say, Curtis, J.: "In acting on applications for temporary injunctions to restrain the infringement of letters patent there is much latitude for discretion. The application may be granted or refused unconditionally, or terms may be imposed on either of the parties as conditions for making or refusing the order. And the state of the litigation, where the plaintiff's title is denied, the nature of the improvement, the character and extent of the infringement complained of, and the comparative inconvenience which will be occasioned to the respective parties by allowing or denying the motion, must all be considered in determining whether it should be allowed or refused and if at all, whether absolutely, or upon some and what conditions."

§ 604. The doctrine was formerly maintained by the English Court of Chancery, that an injunction would not be allowed against the infringement of a patent until the right had been satisfactorily established at law, but it would seem that the jurisdiction may now be exercised on showing color of title, coupled with an assertion of right which is not denied.[1] In this country, the jurisdiction exercised by the federal courts over actions in equity pertaining to patents being derived from statute, and not being exercised merely as ancillary to a court of law, these courts do not in all cases require a verdict at law upon the title before granting even a final injunction.[2] And the modern practice may be regarded as settled, that where the rights under the patent are clear, and the question of defendants' infringement is free from doubt, the patentee will not be compelled in the first instance to proceed at law, especially after the use of his invention for a considerable time without controversy, but he may at once apply to the equity side of the court for relief.[3] And the allowance of a jury trial to test the question of the alleged infringement, on an application for a preliminary injunction, is not a condition precedent to the relief, nor is it to be regarded as a matter of right, but rather as resting in the sound discretion of the court.[4]

§ 605. The province of a preliminary injunction in a patent cause, is to preserve the rights of the patentee pending the litigation of his title. If his title has already been fully established, or is so clear as to preclude a reasonable doubt of its validity, a preliminary injunction may be granted, as in the case of a final injunction, regardless of the injury to defendant; but the case must be substantially free from doubt to warrant this course.[5] And where the granting of the writ

[1] Universities v. Richardson, 6 Ves. 689.

[2] Sickles v. Gloucester etc., 1 Fish. 222; Sanders v. Logan, 2 Fish. 167.

[3] Potter v. Muller, 2 Fish. 465; Shelly v. Brannan, 4 Fish. 198.

[4] Brooks v. Norcross, 2 Fish. 661; Potter v. Fuller, Ib. 251; Motte v. Bennett, Ib. 642. And see Motte v. Bennett for an exhaustive history of the jurisdiction of equity in this class of cases, both in England and America.

[5] Morris v. Lowell etc., 3 Fish. 67. And see Howe v. Morton, 1 Fish. 586

would be more likely to produce than to prevent irreparable mischief, neither an absolute nor a conditional injunction will be allowed.[1] In all such cases, there being an element of discretion which enters largely into the consideration of the motion for a preliminary injunction, the patentee is only entitled to the best judgment of the court upon a question of judicial discretion, and not absolutely to the injunction on any given state of facts.[2]

§ 606. An interlocutory injunction against the infringement of a patent will not be allowed unless complainant's title and defendant's infringement are either admitted, or are so clear and palpable that the court can entertain no doubt on the subject.[3] And whenever, upon the facts presented, a fair and reasonable doubt exists as to whether defendant has actually been guilty of an infringement, or where the right is, in point of law, at least doubtful, and the questions involved are exclusively for a jury, or where a reasonable doubt exists as to the originality and novelty of complainant's invention, or as to the substantial identity between the articles manufactured by defendant and those of complainant, a preliminary injunction will be withheld.[4] So if it does not satisfactorily appear that complainant is the first and sole inventor of the improvements claimed by his patent, the court will not interfere in the first instance.[5] And where a preliminary injunction has already been granted, but the evidence is doubtful as to the originality of the patent, the injunction may be dissolved, defendants being required meanwhile to keep an account of their sales.[6]

§ 607. So long as there is a substantial controversy as to the equities of the parties, the court will not dispose of those

[1] Day *v.* Candee, 3 Fish. 9.

[2] Potter *v.* Whitney, 3 Fish. 77.

[3] Parker *v.* Sears, 1 Fish. 98; American etc. Co. *v.* City of Elizabeth, 4 Fish. 189.

[4] Dodge *v.* Card, 2 Fish. 116; Sullivan *v.* Redfield, 1 Paine 441; Winans *v.* Eaton, 1 Fish. 181.

[5] Thomas *v.* Weeks, 2 Paine, 92.

[6] Sheriff *v.* Coates, 1 Russ. & M. 159.

equities on a motion for an interlocutory injunction, which does not permit the questions involved to be inquired of and defined accurately according to the approved usages of chancery, and interlocutory relief will be refused, especially where the granting of the application might seriously imperil complainant's rights, and its refusal will not endanger them.[1] And if the patent itself is of recent date, and the specifications are obscure and the proof of infringement is meagre and unsatisfactory, an injunction will not be allowed even upon final hearing.[2] But in such case the bill may be retained and complainant required to bring an action at law within a reasonable time.[3]

§ 608. The presumptions in favor of the novelty of a patent, sufficient to constitute the foundation for a preliminary injunction, may be some or all of the following: the oath of the patentee that he was the original inventor; the granting of the patent after full investigation; undisturbed enjoyment by the patentee of the exclusive rights granted by the patent, coupled with acquiescence on the part of the public; direct adjudications at law or in equity establishing its validity, and prior injunctions restraining its infringement. When such grounds of presumption co-exist in favor of the novelty of a patented invention, an injunction will not be refused, or, if granted, will not be dissolved except upon the most conclusive evidence impeaching the patent.[4]

§ 609. Acquiescence on the part of the public in complainant's use of his patented invention is an important consideration in determining a motion for an injunction against the infringement of a patent. And where the party aggrieved can show an undisturbed user and possession for a reasonable time, he is entitled to the relief.[5] And this exclu-

[1] Smith v. Cummings, 1 Fish. 152.

[2] Muscan etc. v. American etc., 1 Fish. 320.

[3] Id.

[4] Hussey v. Whitely, 2 Fish. 120. And see Orr. v. Littlefield, 1 Woodb. & M. 13; Ogle v. Edge, 4 Wash. C. C. 584; Doughty v. West, 2 Fish. 553, Grover etc. Co. v. Williams, 2 Fish. 133.

[5] Orr. v. Littlefield, 1 Woodb. & M. 13; Hill v. Thompson, 3 Meriv. 622; Stevens v. Keating, 2 Ph. 333; Ogle v. Edge, 4 Wash. C. C. 584; Foster v.

sive possession, if of sufficient duration, may warrant the relief, even in the absence of any previous adjudications in favor of the validity of the patent.[1] While the courts have not attempted to fix any definite rule as to the length of time during which the exclusive use and enjoyment of the right must have been continued, it must be sufficient to raise a presumption in favor of the validity of the patent.[2] And such presumption is greatly strengthened by former adjudications in support of the patent.[3] But where the allegations in

Moore, 1 Curt. C. C. 279; Isaacs *v.* Cooper, 4 Wash. C. C. 259; Washburn *v.* Gould, 3 Story, 156, 169; Bickford *v.* Skewes, Web. P. C. 211; Goodyear *v.* New Jersey etc., 1 Fish. 626; Potter *v.* Holland, Ib. 382. "The reason for the presumption in favor of the validity of the grant is the acquiescence of the public in the exclusive right of the patentee, which, it may reasonably be assumed, would not exist unless the right was well founded." Story, J., in Foster *v.* Moore, *supra.* The principles upon which a court of equity will interfere for the protection of a patent before the right has been established at law, are well stated by the Vice Chancellor in Caldwell *v.* Vanvlissengen, 9 Hare, 415, as follows: "The question whether the court will interfere to protect a patentee before he has established his right at law, or will suspend its interference until the right at law has been established, appears to me to depend upon very simple principles. It is part of the duty of this court to protect property pending litigation; but when it is called upon to exercise that duty, the court requires some proof of title in the party who calls for its interference. In the case of a new patent, this proof is wanting; the public whose interests are affected by the patent, have had no opportunity of contesting the validity of the patentee's title, and the court therefore refuses to interfere until his right has been established at law. But in a case where there has been long enjoyment under the patent, (the enjoyment of course including use,) the public have had the opportunity of contesting the patent; and the fact of their not having done so successfully affords, at least *prima facie* evidence that the title of the patentee is good; and the court therefore interferes before the right is established at law. In the present case, I think that the plaintiffs have proved such a case of enjoyment under the patent, and of their title having been maintained at law against the several attempts which have been made to impeach it, that the court is bound at once to interfere for their protection, unless there are other sufficient grounds for withholding its interference."

[1] Goodyear *v.* New Jersey etc., 1 Fish. 626.

[2] Potter *v.* Muller, 2 Fish. 465. And it has been held that such possession for eight years was sufficient evidence, *prima facie*, to warrant an injunction previous to a trial at law. Foster *v.* Moore, 1 Curt. C. C. 279.

[3] Potter *v.* Muller, 2 Fish. 465: Potter *v.* Holland, 1 Fish. 382.

the bill, of exclusive possession by complainant, are met and avoided by allegations and proof of a more peaceable and exclusive possession by defendants, under patents purchased and used by them, no injunction will be allowed.[1]

II. Effect of prior Adjudications.

§ 610. Prior adjudications strong ground for interference.
611. When conclusive.
612. Effect of prior adjudications on extension of patent.
613. Judgments by agreement; award.
614. Prior adjudication not always conclusive.
615. Reissue.

§ 610. Previous adjudications in favor of the validity of the patent whose protection is sought by injunction, afford strong foundation for the relief, and are entitled to great weight in determining the application.[2] And where complainant relies upon prior adjudications in support of his patent as a ground for relief against its infringement, though it is competent for defendant to show that the title was not fairly in controversy in the former cases, or that some material fact was overlooked, yet the considerations which would justify the court in renewing the discussion of the patentee's title, which is already *res adjudicata*, should be such as, if presented to the court after the trial at law, would have sufficed to set

[1] Parker v. Sears, 1 Fish. 93.

[2] Orr v. Littlefield, 1 Woodb. & M. 13; Woodworth v. Hall, Ib. 248; Woodworth v. Edwards, 3 Woodb. & M. 120; Gibson v. Van Dresar, 1 Blatch. 532; Potter v. Holland, 4 Blatch. 238; Goodyear v. New Jersey etc., 1 Fish. 626; Parker v. Brant, Ib. 58; Potter v. Fuller, 2 Fish. 251; Potter v. Whitney, 3 Fish. 77; Conover v. Mers, Ib. 386; Goodyear v. Evans, Ib. 390; Goodyear v. Berry, Ib. 439; Goodyear v. Rust, Ib. 456. Thus, it is said that "where complainant has made out, not merely a grant of the patent, but possession and use and sale under it for some time undisturbed, and beside this a recovery against other persons using it, the courts have invariably held that such a strong color of title shall not be deprived of the benefit of an injunction, till a full trial on the merits counteracts or annuls it." Per Woodbury, J., in Orr v. Littlefield, *supra*.

aside the verdict.[1] And while decisions in former suits concerning the same patent are binding only upon the parties to those suits, yet such adjudications, in so far as they bear upon the points actually in issue between other parties, will be overruled with extreme reluctance.[2]

§ 611. Although it is the duty of the court, upon the hearing of the motion for a preliminary injunction, notwithstanding the fact of previous adjudications having sustained the validity of the patent, to examine the case anew, if defendant was not a party to the former proceedings, yet when the questions of fact are identical the court must recognize such decisions as entitled to very great weight in determining the application.[3] And where the patent has been sustained on a full hearing against other defendants, and the infringement is clear, especially where the precise form of machine used by defendant has been previously passed upon by the court on the question of infringement, complainant is entitled to have his rights promptly protected by injunction.[4] And where the validity of complainant's patent has been established by repeated adjudications, and it is manifest that neither the public nor the defendants will suffer any inconvenience from the issuing of the writ, the fact that it is not alleged that defendants are insolvent, or that complainants would suffer irreparable injury by waiting until a final hearing, constitutes no bar to the relief.[5]

§ 612. The fact that the patent is extended after the adjudications sustaining its validity, does not affect the application of the rule under consideration. Thus, where a patent has been sustained during its original term by four different adjudications, one of them being against the same defendant for the use of the same process involved in the appplication for the injunction, after the extension of the patent the novelty

[1] Parker v. Brant, 1 Fish. 58.

[2] Potter v. Fuller, 2 Fish. 251.

[3] Potter v. Whitney, 3 Fish. 77. And see Goodyear v. Evans, Ib. 390; Goodyear v. Berry, Ib. 439; Goodyear v. Rust, Ib. 456.

[4] Conover v. Mers, 3 Fish. 386.

[5] Goodyear v. New Jersey etc., 1 Fish. 626.

of the invention and the validity of the patent are regarded as sufficiently established by the prior adjudications.[1] But the existence of a substantial doubt as to the identity of the invention covered by the reissue with that contained in the original, is sufficient ground for denying the motion to restrain the infringement of the reissue.[2]

§ 613. The application of the rule giving effect to prior adjudications, is not affected by the fact that the prior judgment was recovered by agreement of the parties, no fraud or collusion being shown.[3] And if the result of a trial at law to determine the right is satisfactory to a court of equity, it may at once interfere for the protection of the patent, even though the defendant is about taking further steps at law.[4] And an award sustaining the validity of the patent, on a reference being had in a trial at law, is entitled to the same consideration as a verdict.[5]

§ 614. Notwithstanding the great weight which, as we have already seen, the courts attach to prior adjudications sustaining the validity of the patent, the recovery of a verdict for plaintiff, in an action at law upon a patent, is not necessarily conclusive upon his right to an injunction, and the court may upon such application consider the true interpretation of the patent, irrespective of the former verdict,[6] especially where a writ of error is pending to the proceedings at law.[7] And where complainant relies upon a previous verdict of a jury and judgment of a court of law, for the establishing of his patent, upon an application for an injunction, he must aver in his bill that such proceedings have taken place.[8] If the verdicts upon which complainant relies have been ren-

[1] Tilghman v. Mitchell, 4 Fish. 615. And see Clum v. Brewer, 2 Curt. C. C. 506, where the same doctrine is maintained, though the relief was refused on other grounds.

[2] Poppenhusen v. Falke, 4 Blatch. 493.

[3] Orr v. Littlefield, 1 Woodb. & M. 13.

[4] Boulton v. Bull, 3 Ves. 140; Bridson v. Benecke, 12 Beav. 7.

[5] Lister v. Eastwood, 26 L. T. 4.

[6] Many v. Sizer, 1 Fish. 31.

[7] Day v. Hartshorn, 3 Fish. 32.

[8] Parker v. Brant, 1 Fish. 58.

dered upon claims so inconsistent and contradictory that the court can not say with certainty what is and what is not an infringement of the patent, the injunction will be refused.[1]

§ 615. Where the validity of a patent has been sustained by a decision at law during its original term, and thereafter a reissue is obtained covering a wider ground than that adjudicated in the original, all that lies between the limits of the original and of the reissue is disputed territory. And if in such case the infringement which it is sought to enjoin lies wholly within that disputed territory, the application for relief will be denied.[2]

[1] Parker v. Sears, 1 Fish. 93.
[2] Poppenhusen v. Falke, 2 Fish. 181.

III. Considerations governing the Court in granting the Relief.

§ 616. Defendant's *bona fides;* effect of patent to defendant.
617. Injunction not granted on patent alone.
618. Question of hardship will not stay the writ in a clear case.
619. *Prima facie* infringement must be made out.
620. Aquiescence of patentee may bar relief.
621. Defendant's solvency; damages at law.
622. Security from defendant in lieu of injunction.
623. Account.
624. Trial at law.
625. Prior use; all the grants need not be infringed.
626. Mere denial in the answer not a bar to the relief.
627. Writ not necessarily dissolved on answer.
628. Licenses.
629. Due diligence necessary in assertion of the right.
630. Apprehensions of future infringement ground for relief.
631. Writ not refused because of subsequent patent to defendant.
632. Evidence required.
633. Parties to the bill.
634. Territorial jurisdiction.
635. Writ may be granted after expiration of patent.
636. Dissolution.
637. Penalty; omission in bill.
638. Process may be protected though not patented.
639. Jurisdiction exercised over foreigners.
640. Violation and punishment thereof.

§ 616. Where defendant is acting in good faith under letters patent covering his process of manufacture, he has a *prima facie* right to continue, and the court will not, upon *ex parte* affidavits, on an application for a preliminary injunction, decide the whole merits of a *bona fide* issue and thus anticipate the final judgment upon the legal questions involved.[1] And if in such case defendant shows a belief that he has a just defense, and has not wilfully pirated complainant's invention, the court will require a case of evident

[1] Goodyear v. Dunbar, 1 Fish. 472.

mistake of law, or of fact, or both, in the defense thus interposed, before it will resort to the remedy by injunction.[1] But the fact that defendant, after the alleged infringement, has received a patent for the article manufactured by him, will not prevent an injunction if the infringement is satisfactorily established, since the granting of a subsequent patent merely serves to indicate the opinion of the officers granting it, upon an *ex parte* examination of the subject, and is by no means conclusive.[2] Especially if complainant has already established his title at law and obtained an injunction in the same court, the relief will be allowed, although defendant claims to have patented his apparatus in good faith.[3] And where complainant makes out a strong *prima facie* case for an injunction, it will not be refused because defendant alleges that he is the first and original inventor, his evidence resting upon an *ex parte* application to the patent office and upon his own affidavit, he having slept upon his rights for a long period of years.[4]

§ 617. Equity will never interfere upon the mere patent alone, without proof of user or sales, or of recoveries at law,[5] and where complainant has failed in previous trials at law to establish his rights, and it does not appear that they have been acquiesced in by the public, the relief will be withheld.[6] And where complainant's patent has but a short time yet to run, and there can be but little difficulty in determining what would be a proper indemnity for the use of his invention in the manufacture of defendant's machines, defendant's apparatus embracing improvements which can not be used without the original invention of complainant, upon which they are engrafted, the defendant may be permitted, in lieu of a tem-

[1] Goodyear *v.* Dunbar, 1 Fish. 472.

[2] Morse etc. *v.* Esterbrook, 3 Fish. 515.

[3] Sickels *v.* Tileston, 4 Blatch. 109.

[4] Potter *v.* Stevens, 2 Fish. 163.

[5] Hovey *v.* Stevens, 1 Woodb. & M. 290; Toppan *v.* National Co., 4 Blatch. 509, 2 Fish. 196.

[6] Serrell *v.* Collins, 4 Blatch. 61; Toppan *v.* National Co., Ib. 509. And see North etc. *v.* Kershaw, Ib. 70; Muscan etc. *v.* American etc., Ib. 174.

porary injunction, to give bond with approved security to account and pay such sum as the court may finally decree.[1]

§ 618. While considerations of the relative hardship and inconvenience to the respective parties, by granting or withholding the relief, may properly be taken into account in determining the application, yet where the right is well established and the violation clear, neither considerations of public or private convenience, or of hardship to the defendant, will prevent the court from interfering.[2] More especially where complainant's right has been established by previous adjudication, will the court refuse to be governed by considerations of hardship to defendant from granting the injunction, since it is manifestly unjust that a patentee, whose rights have already been established, should be under the necessity of meeting litigation in a great variety of cases, thereby rendering his patent comparatively valueless.[3]

§ 619. While it is essential that the patentee should produce *prima facie* evidence of his title, yet this alone will not suffice to entitle him to the injunction, since, however clearly the validity of the patent may be established, a *prima facie* case of infringement must be made out before equity will interpose.[4] But if the case be free from doubt in other respects, the relief will not be refused because the patent is a recent one.[5]

§ 620. Acquiescence of the patentee in the use of his invention is sometimes an important element in determining an application for a preliminary injunction.[6] Thus, where the patentee has stood by for many years and acquiesced in the use of the article which he afterward seeks to enjoin, such acquiescence, without objection and without demand of compensation, is regarded as conclusive evidence that the continuance

[1] Howe *v.* Morton, 1 Fish. 586.

[2] Sickels *v.* Tileston, 4 Blatch. 109; Potter *v.* Fuller, 2 Fish. 251; Ely *v.* Monson etc., 4 Fish. 64.

[3] Ely *v.* Monson etc., *supra.*

[4] Hill *v.* Thompson, 3 Meriv. 626.

[5] Clark *v.* Ferguson, 1 Giff. 184.

[6] Parker *v.* Sears, 1 Fish. 93; Goodyear *v.* Honsinger, 3 Fish. 147

of the use of his invention for the short period yet remaining before the expiration of his patent, will not constitute such an irreparable injury as to warrant an injunction.[1] And where the patentee, while licensing certain persons to use his invention, has permitted others to use it without license and without objection, such conduct may be taken into consideration by the court, and although it is satisfied of the validity of the patent, it will not interfere by an absolute and unconditional injunction, but will grant a temporary writ, with leave to defendant to come in and have the same dissolved upon giving security to complainant.[2]

§ 621. Defendant's pecuniary responsibility is a material circumstance to be taken into account on the application for an injunction, as is also the fact that he does not make or vend the patented machine, but merely uses it, the only injury resulting therefrom to the patentee being the loss of his royalty, and not a damaging and constantly increasing competition.[3] So where the injury to the patentee resulting from the infringement consists, not in the use of the invention, but in depriving him of compensation for such use, the price or value of a license constituting the rule of damages, an injunction is not the proper remedy to enforce payment of the money, since the measure of damages being a certain and fixed sum, ample redress can be had at law.[4]

§ 622. Although defendant's machine may be an infringement of that of complainant, yet if it contain other and valuable improvements not covered by complainant's patent, and if the issuing of the writ would be likely to prejudice the actual rights of defendant, without being as beneficial to complainant as an account of profits with security for their payment, the injunction will be withheld on condition of defendant's accounting and giving security for payment.[5]

[1] Parker v. Sears, 1 Fish. 93.

[2] Goodyear v. Honsinger, 3 Fish. 147.

[3] Morris v. Lowell etc., 3 Fish. 67.

[4] Sanders v. Logan, 2 Fish. 167. And see Livingston v. Jones, Ib. 207.

[5] Stainthorp v. Humiston, 2 Fish. 311. And see Howe v. Morton, 1 Fish. 536.

And where the validity of complainant's patent is denied on the ground of a prior public use, the patent itself never having been adjudicated, and the general allegation in the bill of acquiescence on the part of the public is unsupported by proof and denied by the answer, defendant will not be enjoined from constructing a single machine merely for his own use, if he gives security to complainant for all loss and damage that may result to him by reason of the construction and use of the machine.[1]

§ 623. The jurisdiction of the United States courts in this class of cases being derived wholly from statute, the English rule that the account is strictly incident to the injunction, and that where an injunction is refused an account will be denied, is not applicable in this country.[2] And if the patent has expired between the time of filing the bill and the hearing, the court may direct an account, though no injunction will be allowed against the future use of the article.[3]

§ 624. Nothwithstanding the rule is well established in England, that a final and perpetual injunction will not be granted where the answer denies the validity of the patent, without sending the parties to law to decide that question,[4] yet in this country the rule is not inflexible, and it rests in the discretion of the court to grant the relief, with or without a trial at law.[5] It would seem, however, that a reasonable doubt as to complainant's right, or the validity of the patent, constitutes ground for requiring a trial at law.[6]

[1] Morris *v.* Shelbourne, 4 Fish. 377.

[2] Sickles *v.* Gloucester etc., 1 Fish. 222.

[3] Imlay *v.* Norwich etc., 4 Blatch. 227.

[4] Bacon *v.* Jones, 4 Myl. & Cr. 436; Renard *v.* Levinstein, 2 Hem. & M. 628

[5] Goodyear *v.* Day, 2 Wal., Jr. 283; Buchanan *v.* Howland, 5 Blatch. 151.

[6] Ogle *v.* Edge, 4 Wash. C. C. 584. Washington, J., says: "I take the rule to be in cases of injunctions in patent cases, that where the bill states a clear right to the thing patented, which together with the alleged infringement is verified by affidavit, if he has been in possession of it by having used or sold it, in part or in the whole, the court will grant an injunction and continue it till the hearing or further order, without sending the plaintiff to law to try his right. But if there appear to be a reasonable doubt as

§ 625. On an application to enjoin the infringement of a patent, the court may take into consideration complainant's possession of the right and his use of the invention before the application for the grant of letters patent.[1] But the use must be a public use, under an avowed claim of right, since, if this be not so, there is no exclusive possession as against the public, and no claim in which it can acquiesce.[2] It is not, however, necessary that all the grants of right in the patent should have been infringed, but the injunction will issue for the violation of a portion of them.[3]

§ 626. Mere denial by answer of the equity of the bill does not prevent the court from looking into the law and the facts of the case, and where the right depends upon the interpretation to be given to the letters patent, the court will look into the instrument and construe it, notwithstanding the answer denies the right to the relief.[4] And where the infringement of the patent is clear, and the right to the injunction manifest, it will not be withheld because of defendant's offering security for damages and an account of sales.[5]

§ 627. An injunction in patent cases is not designed to delay or impair the right of trial by jury, but rather to make the *prima facie* title prevail until such trial can be had.[6] Hence, where an injunction has been granted on proof of former recoveries and long possession, it will not necessarily be dissolved on an answer denying the validity of the patent, but will be continued to allow an issue at law upon that question.[7] Nor will the injunction be dissolved because of doubts as to the validity of the patent, growing out of errors

to the plaintiff's right, or to the validity of the patent, the court will require the plaintiff to try his title at law, sometimes accompanied with an order to expedite the trial, and will permit him to return for an account in case the trial at law should be in his favor."

[1] Sargent *v.* Seagrave, 2 Curt. C. C. 553.

[2] Toppan *v.* National Co., 4 Blatch. 509.

[3] Potter *v.* Holland, 4 Blatch. 238, 1 Fish. 382.

[4] Clum *v.* Brewer, 2 Curt. C. C. 506.

[5] Tracy *v.* Torrey, 2 Blatch. 275.

[6] Woodworth *v.* Rogers, 3 Woodb. & M. 135.

[7] Orr *v.* Merrill, 1 Woodb. & M. 376.

on the part of the officers issuing it, where steps have been taken in congress to correct such errors by appropriate legislation.[1]

§ 628. Where an injunction is in full force against the use of a patented machine, the court will not allow its use by parties claiming under the patentee of the invention enjoined.[2] But, though a provisional injunction will be granted against the licensee of a patent, if applied for during his violation of the restrictions subject to which he received his license, yet if it appears that such violation was made under a misapprehension of his rights, and has been discontinued, the injunction will be withheld.[3] And where, by the terms of the license, a forfeiture is incurred by non-payment, the remedy may be either at law to enforce the payment, or in equity to restrain the use of the patent.[4] But a license to use the patent, granted by one tenant in common, can not be enjoined by another tenant in common, their right to sell or license being equal.[5] And where it appears by the answer that defendant was acting under a license from complainant, the injunction will be dissolved.[6]

§ 629. To obtain the protection of equity against infringement, due diligence must be used in the assertion of the right. And if complainant has encouraged or acquiesced in the infringement, or has permitted the erection of works and large expenditures of money in the manufacture of the patented invention, he will not be protected.[7] And where defendant has manufactured under authority of a patent, and

[1] Woodworth v. Hall, 1 Woodb. & M. 389.

[2] Woodworth v. Edwards, 3 Woodb. & M. 120.

[3] Wilson v. Sherman, 1 Blatch. 536.

[4] Woodworth v. Weed, 1 Blatch. 165. It may well be doubted, however, whether this rule can be maintained consistently with the established principle that equity will never interfere where there is adequate remedy at law.

[5] Clum v. Brewer, 2 Curt. C. C. 506.

[6] Goodyear v. Bourn, 3 Blatch. 266.

[7] Bacon v. Jones, 4 Myl. & Cr. 436; Bridson v. Benecke, 12 Beav. 7; Bovill v. Crate, 1 L. R. Eq. 388; North v. Kershaw, 4 Blatch. 70; Sykes v. Manhattan, 6 Blatch. 496.

with full knowledge of complainants, for a considerable length of time, without molestation, and has invested money in the business, to warrant an injunction the case must be free from all reasonable doubt.[1]

§ 630. It is not necessary to the issuing of the writ that the wrong should actually have been committed, but reasonable grounds for belief that an infringement may occur in the future, will warrant the injunction, where the title has been established at law.[2] And it will not suffice for defendants to answer that what they have done since the finding of the verdict was not in violation of complainant's right; they should state explicitly that they do not intend to commit any

[1] North v. Kershaw, 4 Blatch. 70.

[2] Poppenhusen v. New York, 4 Blatch. 184. This was a bill for an injunction where a verdict had been had against the defendants in the same court in an action at law upon the same patents. The bill alleged violation of complainant's rights after the verdict, and that defendants would continue such violation in future, unless restrained by injunction. Ingersoll, J., delivering the opinion of the court, says: "The writ of injunction is a remedial writ in the nature of a prohibition. The object of the present motion for an injunction is to prevent the commission of injuries in the future, not to redress injuries that are past. The writ prayed for is to act as a remedy against a threatened wrong, by preventing the commission of such wrong; and it is not necessary, before a writ to prevent a wrong can issue, that the wrong should actually have been committed. If it were, the remedy by injunction would be a very inadequate one. If the rights of a party, under a patent, have been fully and clearly established, and an infringement of such rights is threatened, or, if, when they have been infringed, the party has good reason to believe they will continue to be infringed, an injunction will issue. It issues for the reason that there is good ground to believe that in future they will be infringed. Where a trial at law has been had, resulting in a verdict in favor of the patentee, and the right to the improvement patented has been fully established, to the satisfaction of the court, and the infringement of right made clear, such a trial, resulting in such a verdict, is sufficient, without any other proof to authorize the court to grant an injunction to prevent any future violation of right. Such a trial, with such a result, affords sufficient proof, that, in future, there will be an infringement, unless such infringement is restrained by injunction. It is, under such circumstances, almost a matter of course, that the injunction should be allowed. (Neilson v. Harford, Webster's Patent Cases, 373.) Such a trial at law, resulting in such a verdict, to the entire satisfaction of the court, has taken place between the parties to this suit."

infringement in the future.[1] Nor will the fact that since the commencement of suit defendants have ceased to infringe, and do not threaten further infringement, prevent the issuing of a preliminary injunction, if a necessity for the writ existed at the time of filing the bill, complainants alleging that they apprehend a continuance of the infringement. In such cases the patentee will not be compelled to rest his equities upon the mere assertion of defendants that the infringement shall not be repeated, and the court will impose the necessary restraint to prevent a repetition of the injury.[2]

§ 631. Complainant's patent being fully established at law, and the infringement being clearly proven, the injunction will not be refused because of defendant's reliance upon a subsequent patent to himself, which contains on its face satisfactory evidence that its process involves an infringement of the prior patent.[3] But to warrant the injunction, it must appear that defendant has either used the patented machine himself, or has employed others to use it for him, or has profited by its use.[4] And where the novelty of the invention is denied, and the question is involved in considerable doubt, the injunction will be withheld until a trial at law.[5]

§ 632. Upon the application for the writ, it must appear, either in the sworn bill, or by affidavit, that complainant is the inventor of the patent to be protected, and it does not suffice that he swore to this when he obtained his patent.[6] And on a motion for a dissolution of the injunction, upon affidavits, sufficient proof must be adduced to overcome the equity of the bill and the evidence supporting it.[7] And where a special injunction is granted upon bill filed, a motion to dissolve will not be heard upon the same evidence, or on new

[1] Poppenhusen v. New York etc., 4 Blatch. 184.

[2] Potter v. Crowell, 1 Abb. U. S. R. 89, 3 Fish. 112; Jenkins v. Greenwald, 2 Fish. 37.

[3] Goodyear v. Evans, 6 Blatch. 121.

[4] Woodworth v. Hall, 1 Woodb. & M. 249.

[5] Booth v. Garelly, 1 Blatch. 247.

[6] Sullivan v. Redfield, 1 Paine, 441.

[7] Sparkman v. Higgins, 1 Blatch. 205.

evidence improperly neglected on the former hearing, but new and material testimony will be required.[1]

§ 633. Equity will not, on the application of the legal owner, enjoin the equitable owner of a patent.[2] But where one person has the legal and another the equitable right to the patent, both should be joined in an action for infringement.[3] And where the infringement is the act of several persons jointly, they should all be made defendants, but if it is their separate act, separate bills should be filed against them.[4] The directors of a corporate company who, as the agents of the company, have committed an infringement, should be made parties.[5] And the assignor of a patent, who still retains an interest in the patent, though none in the territory where the infringement occurred, is a proper party to a bill for an injunction.[6] So the assignee of part of a patent, within a particular territory, may properly enjoin the infringement in that territory.[7] And where one of three parties works a patented machine, which is owned by two others, the relief will be granted against all.[8] Nor will the court refuse to enjoin because a number of parties, all of whom are interested in the patent, have contributed to a common fund for the protection of their common rights by prosecuting infringements of those rights.[9]

§ 634. For the purpose of restraining the infringement of a patent, the court need only have jurisdiction of the person.[10] But where defendant resides in another jurisdiction, in which the infringement occurred, the court will not interfere.[11] And

[1] Woodworth v. Rogers, 3 Woodb. & M. 135.
[2] Clum v. Brewer, 2 Curtis, 506.
[3] Stimpson v. Rogers, 4 Blatch. 333; Goodyear v. Allyn, 6 Blatch. 33; Goodyear v. New Jersey R. R. 1 Fish. 626.
[4] Dilly v. Doig, 2 Ves. Jr. 486.
[5] Betts v. DeVitre, 34 L. J. Ch. 289; Goodyear v. Phelps, 3 Blatch. 91.
[6] Woodworth v. Wilson, 4 How. 712.
[7] Ogle v. Edge, 4 Wash. C. C. 584.
[8] Woodworth v. Edwards, 3 Woodb. & M. 120.
[9] Potter v. Fuller, 2 Fish. 251.
[10] Wilson v. Sherman, 1 Blatch. 536.
[11] Goodyear v. Bourn, 3 Blatch. 266.

it has been held that a defendant who is the owner of a patent in certain territory, can not be enjoined from selling the patented machine in complainant's territory, on the ground that the law extends protection only to the thing patented, and not to its product.[1]

§ 635. An injunction may be granted, although the patent is about to expire, to restrain the sale of machines manufactured in violation thereof while it is yet in force.[2] And the provisions of the writ will be extended to an assignee of the defendant, who took an assignment of defendant's rights *pendente lite*, and with full knowledge of all the proceedings.[3]

§ 636. Where an injunction is granted against the infringement of a patent, and at the same time complainant is ordered to bring an action at law to test his rights, delay in proceeding at law will constitute sufficient ground for a dissolution of the injunction, but defendants may still be required to keep an account after the dissolution.[4] And the court may, on sufficient cause shown, permit the injunction to be dissolved upon condition of defendants giving security to account to complainants if their right shall be established.[5] But a decree for an injunction in a patent cause, with a reference to a master to take an account of profits, is not considered a final decree from which an appeal will lie.[6]

§ 637. The penalty imposed by act of congress for not marking patented articles, does not affect the right to an injunction to restrain an infringement.[7] Nor is complainant barred from asking an injunction upon the hearing because of his neglect to apply for the relief by an interlocutory motion, though such neglect will impose upon him the obligation of making out a clear and unexceptionable title at the hearing.[8]

[1] Boyd *v.* Brown, 3 McLean, 295.
[2] Crossley *v.* Beverley, 1 Russ. & M. 166, note.
[3] Parkhurst *v.* Kinsman, 2 Blatch. 78.
[4] Stevens *v.* Keating, 2 Ph. 333.
[5] Brooks *v.* Bicknell, 3 McLean, 250.
[6] Barnard *v.* Gibson, 7 How. 650; Humiston *v.* Stainthorp, 2 Wal. 106.
[7] Goodyear *v.* Allyn, 6 Blatch. 33, 3 Fish. 374.
[8] Bacon *v.* Spottiswoode, 1 Beav. 382; Buchanan *v.* Howland, 5 Blatch. 151

§ 638. A process of manufacture may, under certain circumstances, be protected by injunction, though not the subject of a patent. Thus, where defendant, through breach of contract and in violation of confidence, has become possessed of a secret process of manufacture, he will be enjoined from making any use of the secret. Though complainant in such a case may not have a good title for protection in equity as against the public generally, his process not being patented, he is entitled to protection against the defendant, who has obtained possession of his secret in violation of the contract of the person by whom it was communicated to defendant.[1]

§ 639. The jurisdiction of equity for the protection of patents is exercised over foreigners within the limits of the country granting the patent, as well as over its own subjects and citizens. And an injunction will be allowed to restrain the citizens of one nation from using machinery patented to the citizens of another, on board their ships within the harbors of the nation granting the patent.[2]

[1] Morison *v.* Moat, 9 Hare, 241.

[2] Caldwell *v.* Vanvlissengen, 9 Hare, 415. The principles applicable to injunctions against the infringement of patents by foreigners within the jurisdiction of the government granting the patent, are well set forth by the Vice Chancellor in this case, as follows: "I take the rule to be universal that foreigners are in all cases subject to the laws of the country in which they may happen to be; and if in any case, when they are out of their own country, their rights are regulated and governed by their own laws, I take it to be, not by force of those laws themselves, but by the law of the country in which they may be adopting those laws as part of their own law for the purpose of determining such rights. * * * * Foreigners coming into this country are, as I apprehend, subject to actions for injuries done by them whilst here to the subjects of the crown. Why then are they not to be subject to actions for the injury done by their infringing upon the sole and exclusive right, which I have shown to be granted in conformity with the laws and constitution of this country? And if they are subject to such actions, why is not the power of this court, which is founded upon the insufficiency of the legal remedy, to be applied against them as well as against the subjects of the crown. It was said, that the prohibitory words of the patent were addressed only to the subjects of the crown; but these prohibitory words are in aid of the grant and not in derogation of it; and they were probably introduced at a time when the prohibition of the crown could be enforced personally against parties who

§ 640. One who has been enjoined from the infringement of a patent, violates the mandate of the court by using a machine which in substance and principle contains important portions of the patent, though in other respects it may contain new and improved features.[1] So if he uses another patent, similar in principle, the author of which has also been enjoined by the owner of the first patent, he is guilty of a contempt of court.[2] And a defendant who has been enjoined from infringing, by the manufacture and sale of the article, is equally guilty of a violation of the writ, whether he sells in his own right, or as the agent of another.[3] So working for wages in a shop or factory, where articles are manufactured infringing on complainant's patent, is a viola-

ventured to disobey it. The language of this part of the patent, therefore, does not appear to me to alter the case. * * * * In the argument on the part of the defendants, much was said on the hardship of this court's interfering against them, and upon the inconveniences which would result from it; and some reference was made to the policy of this country; but it must be remembered that British ships certainly can not use this invention without the license of the patentees, and the burthens incident to such license; and foreigners can not, I think, justly complain that their ships are not permitted to enjoy, without license and without payment, advantages which the ships of this country can not enjoy otherwise than under license and upon payment. It must be remembered, that foreigners may take out patents in this country, and thus secure to themselves the exclusive use of their inventions within her Majesty's dominions; and that, if they neglect to do so, they, to this extent, withhold their invention from the subjects of this country. It is to be observed also, that the enforcement of the exclusive right under a patent does not take away from foreigners any privilege which they ever enjoyed in this country; for, if the invention was used by them in this country before the granting of the patent, the patent I apprehend would be invalid. One principal ground of inconvenience suggested was, that if foreign ships were restrained from using this invention in these dominions, English ships might equally be restrained from using it in foreign dominions; but I think this argument resolves itself into a question of national policy, and it is for the legislature, and not for the courts, to deal with that question; my duty is to administer the law and not to make it. Upon the grounds which I have referred to, I think that the facts stated in the affidavits and answer do not furnish sufficient grounds for refusing these injunctions."

[1] Woodworth *v.* Rogers, 3 Woodb. & M. 135.

[2] Id.

[3] Potter *v.* Muller, 2 Fish. 631.

tion of the injunction, if done by one on whom the writ was served, and will be punished by attachment.[1] And in case of a willful violation of an injunction against the infringement of a patent, it is proper for the court, on motion for an attachment against defendant, to impose upon him the payment of such counsel fees and disbursements as were necessary to establish the violation of the injunction.[2]

[1] Goodyear v. Mullee, 5 Blatch. 429, 8 Fish. 209.
[2] Doubleday v. Sherman, 4 Fish. 253.

CHAPTER XV.

OF INJUNCTIONS AGAINST THE INFRINGEMENT OF COPYRIGHTS.

§ 641. Foundation of the jurisdiction; exercised only by federal courts.
642. Complainant must come into court with clean hands.
643. Requisites of bill; injunction not dependent on discovery.
644. Right need not be established at law.
645. Difficulty of ascertaining piracy; reference to master.
646. Quotations and extracts.
647. Rule as to compilations.
648. Quantity of pirated matter not always a test.
649. Variations merely colorable will not prevent an injunction.
650. When relief may be withheld until action at law.
651. Statute must be strictly complied with.
652. Effect of writ on sale of book enjoined no bar to relief.
653. Extracts; law reports.
654. Musical compositions.
655. Plays protected, but not mere spectacular dramas.
656. Abridgments.
657. Distinction between compilation and abridgment.
658. Re-arrangement of pirated matter will not avail.
659. Complainant's conduct may estop him from relief.
660. Piracy limited to multiplying copies of original.
661. Where complainant is agent of government.
662. Bill and parties thereto.
663. Unpublished manuscripts entitled to protection.
664. Private letters.
665. Private letters; scientific lectures.
666. Publication of libel will not be enjoined.
667. Magazine, when enjoined.
668. Common law right.
669. Covenants against publication.
670. Translation not an infringement.
671. Equitable title will be protected.

§ 641. The jurisdiction of equity in restraining violations of copyright, as in case of the infringement of patents, is

based upon the necessity of preventing irreparable mischief and vexatious litigation, as well as securing the rights of authors and their representatives.[1] It is not indispensable to obtaining the relief, that complainant should make out a clear legal title, but the court will be content with a *prima facie* title, either legal or equitable, or with a clear color of title and assertion of the right.[2] By acts of congress, the power of issuing injunctions in cases of copyright in this country is vested in the United States courts, and as in the case of patents, the jurisdiction is exclusively exercised by these courts.[3]

§ 642. The interference by injunction being purely equitable, he who seeks this species of relief must come into court with clean hands, and a book which is itself a piracy will not be protected.[4] And since, on grounds of public policy, no copyright can exist in a work which is manifestly immoral, irreligious, or obscene, if it be matter of doubt whether the work in favor of which the aid of equity is sought comes within these classes, the threatened piracy will not be restrained, but the party will be left to pursue his remedy at law.[5] And where there is doubt as to whether the work sought to be protected impugns the doctrines of the Scriptures, equity will refuse an injunction against its infringement.[6]

[1] 2 Story's Eq. § 930; Saunders *v.* Smith, 3 Myl. & Cr. 728.

[2] 2 Story's Eq. § 935; Universities *v.* Richardson, 6 Ves. 689; Chappell *v.* Purday, 4 Y. & C. 485.

[3] Dudley *v.* Mayhew, 3 N. Y. 9; 16 Statutes at Large, ch. 230, p. 212. In the English Court of Chancery relief by injunction is not allowed for the protection of the copyright of a foreigner. Delondre *v.* Shaw, 2 Sim. 237.

[4] Cary *v.* Faden, 5 Ves. 24; Barfield *v.* Nicholson, 2 Sim. & Stu. 1.

[5] 2 Story's Eq. § 936; Southey *v.* Sherwood, 2 Meriv. 435; Lawrence *v.* Smith, Jac. 471. And see Martinetti *v.* Maguire, 1 Abb. U. S. R. 356.

[6] Lawrence *v.* Smith, Jac. 471. Eldon, Chancellor, says: "Looking at the general tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt whether this book does not violate that law, I can not continue the injunction. The plaintiff may bring an action, and when that is decided he may apply again."

§ 643. Where the bill upon its face establishes the existence of the copyright and of complainant's title, and shows a wrongful and willful violation thereof, from which serious injuries have resulted, or are likely to result, the injunction will be granted, its extent depending upon the proof and the nature of the publication.[1] And this relief is not dependent upon the discovery prayed by the bill, but may be granted or refused independent of the discovery.[2] Complainant must, however, show reasonable diligence in coming into court, and delay in making the application will, unless satisfactorily accounted for, be sufficient ground for refusing relief.[3]

§ 644. We have already seen, in discussing the subject of injunctions to restrain the infringement of patents, that the stringency of the rule formerly maintained by the English Court of Chancery, requiring the right to be first established at law, has been much relaxed, and that where the right is clear and the infringement unquestioned, the patentee will not be compelled in the first instance to proceed at law.[4] The same observations are applicable where an injunction is sought against an infringement of copyright, and while the court may, if it sees fit, require a verdict at law touching the alleged infringement,[5] yet the doctrine may now be regarded as well settled, that both the right and the infringement may be adjudicated in a court of equity, without having been first determined at law.[6]

§ 645. The chief difficulty experienced in attempting to apply the principles of equity to the protection of copyrights, is in ascertaining whether the work sought to be enjoined is an original or a piracy. Where the work is of such a character that the piracy may be easily detected, the court will itself make the examination.[7] But the more usual practice is to

[1] Atwill *v.* Ferrett, 2 Blatch. 39; Lewis *v.* Fullarton, 2 Beav. 6.
[2] Atwill *v.* Ferrett, 2 Blatch. 39.
[3] Mawman *v.* Tegg, 2 Russ. 393; Campbell *v.* Scott, 11 Sim. 31.
[4] See § 604, *ante*, and cases cited.
[5] Blunt *v.* Patten, 2 Paine, 397.
[6] Farmer *v.* Calvert etc. Co., 5 Chicago Legal News, 1.
[7] Lewis *v.* Fullarton, 2 Beav. 6.

§ 648. Though the question as to the originality of the work which it is sought to enjoin, generally turns upon the extent to which the materials of the prior publication have been used and the quantity abstracted, yet resort must frequently be had to the nature and objects of the selections, as well as their quantity.[1] And the question of the value of the materials abstracted must also be taken into consideration, since, though the parts taken may comprise but a small portion of the original work in quantity, they may nevertheless constitute its chief value.[2]

§ 649. Though one may use the same materials as his predecessor, and derive them from the same source, yet, if

on paper. The defendant no doubt had the right to go to the common source of information, and having ascertained those boundaries, to have drawn them upon its map, notwithstanding that in this respect it would have been precisely like complainant's map (which of course it would have been if they were both correct). But he had no right to avail himself of this very labor on the part of complainant in order to avoid it himself. As appears by complainant's affidavit, these boundaries were fixed by the boards of supervisors of the respective counties, and not by legislative enactment, thus showing that the labor must have been much greater than it would have been if such boundaries could have been ascertained from the statutes of the state."

[1] Folsom *v.* Marsh, 2 Story's R. 100. The considerations to be observed in determining the question of piracy are stated in this case by Story, J., as follows: "We must often in deciding questions of this sort look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and can not fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under color of publishing 'elegant extracts' of poetry, include all the best pieces at large of a favorite poet, whose volume was secured by a copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume."

[2] Bramwell *v.* Halcomb, 3 Myl. & Cr. 738; Gray *v.* Russell, 1 Story's R. 11; Farmer *v.* Calvert etc. Co., 5 Chicago Legal News, 1.

availing himself of his labor he should adopt his arrangement of those materials, he would be guilty of such an infringement as would warrant the interference of equity, even though the new work should be disguised under a colorable variation from the old.[1] So while extracts may be made for purposes of criticism, comment, review or illustration, if done in good faith, yet if the citations go so far as to supersede the original work, and to substitute therefor the later one, equity may properly interfere.[2] And the true test is to

[1] Jarrold *v.* Houlston, 3 Kay & J. 708; Hotten *v.* Arthur, 1 Hem. & M. 603; Gray *v.* Russell, 1 Story's R. 11.

[2] Wilkins *v.* Aikin, 17 Ves. 422. In this case defendant admitted by his answer that he had copied portions of complainant's work, representing them as fair quotation and abridgment, and admitted that he had copied from some of complainant's drawings. He insisted, however, that his work was a distinct work and not merely an abridgment of that of complainant, and that the abridgments and quotations constituted only a small portion of the work. Eldon, Chancellor, says: "The jurisdiction upon subjects of this nature is assumed merely for the purpose of making effectual the legal right, which can not be made effectual by any action for damages; as, if the work is pirated, it is impossible to lay before a jury the whole evidence as to all the publications which go out to the world, to the plaintiff's prejudice. A court of equity, therefore, acts with a view to make the legal right effectual by preventing the publication altogether; and accordingly in the exercise of this jurisdiction, where a fair doubt appears, as to the plaintiff's legal right, the court always directs it to be tried, making some provision in the *interim*, the best that can be, for the benefit of both parties. There is no doubt that a man can not, under the pretense of quotation, publish either the whole or part of another's work; though he may use, what it is in all cases difficult to define, fair quotation. Difficulties have arisen in cases that have occurred upon which I should have taken the same course by sending them to the consideration of a court of law. In the case of maps, for instance, one man publishes the map of a county; another man, with the same design, if he has equal skill and opportunity, will by his own labor produce almost a *fac simile*, and has a right to do so; but from his right through that medium was it ever contended that he might copy the other map? Suppose a publication, professing to be an account of the improvement of maps of the county of Middlesex, compiling the history of all the maps of it ever published; pointing out the peculiarities belonging to them, and giving copies of them all, as well those, the copyright of which have expired, as those of which it was subsisting; it is not easy to say with certainty what would be the decision upon such a case. If it was a fair history of the maps of the county which had been published, and the pub-

ascertain whether the plan, arrangement and illustrations of the original work have been used with such colorable alterations as to disguise this use, or whether defendant has simply availed himself of the common sources and materials open alike to all.[1] But an author will not be allowed to prohibit a subsequent writer from using the same authorities quoted in his work, even on proof that such authorities were suggested to the later writer by a perusal of the former work.[2] The subsequent writer, however, will not be allowed to copy the quotations or extracts from the earlier work, but he must go to the same sources from which such extracts were drawn, though the use of a single quotation without verification, or of a single argument deduced from the facts stated by the former author, does not constitute such a piracy as calls for the interference of equity.[3]

lication of the individual map was merely an illustration of that history, that is one way of stating it; but if a jury could perceive the object to make a profit by publishing the map of another man, that would require a different consideration. The slightest circumstances, therefore, in these cases make the most important distinction. So in the case of a book of roads, there is no doubt that, though any man may publish a book of roads that would be precisely the same as Patterson's, yet he can not take that book and copy it. The fair question, therefore, upon such a compilation as this, is whether it is competent to the defendant to publish to the world the plates, which it is admitted he could not publish as copies of the plaintiff's. I have no doubt that both these parties are actuated by very honorable views. Upon inspection of the different works I observe a considerable proportion taken from the plaintiff's, that is acknowledged; but also much that is not; and in determining whether the former is within the doctrine upon this subject, the case must be considered as also presenting the latter circumstance. The question upon the whole is, whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation, deserving the character of an original work. The effect, I have no doubt, is prejudicial; it does not follow, that therefore there is a breach of the legal right; but where that is so, and there is a fair question, the injunction ought not to be dissolved, but according to the usual course, maintaining the injunction, an action should be brought forthwith. The proper course in this instance will be to permit this work to be sold in the meantime, the defendant undertaking to account according to the result of the action."

[1] Emerson v. Davies, 3 Story's R. 798; Webb v. Powers, 2 Woodb. & M. 497.

[2] Pike v. Nicholas, 39 L. J. Ch. 435.

[3] Id.

§ 650. Where an injunction against the invasion of a copyright depends upon the effect of an agreement and the construction it shall receive, relief will be withheld until a recovery in an action at law.[1] And if the publication is of such a nature as to render it doubtful whether the author can maintain any action at law, an injunction will be withheld until the court can be satisfied upon this point.[2] But mere difficulty in estimating the profits arising from a sale of books sought to be enjoined, will not deter a court of equity from awarding an injunction.[3]

§ 651. A copyright title is not perfect until the requirements of the statute have been strictly complied with, such requirements being considered not as merely directory provisions, but as indispensable prerequisites to a perfect title. And the failure to publish the notice required by law in the manner prescribed, constitutes a fatal objection to relief in equity against an infringement of copyright.[4]

§ 652. The fact that an injunction will effectually stop the sale and circulation of the work enjoined, constitutes no objection to granting the relief, if the piracy be established, since, if the original can not be separated from the pirated matter without destroying the value of the former, the defendant, having made the mixture, must suffer the consequences.[5] And the same principles apply in such case

[1] Walcot v. Walker, 7 Ves. 1.

[2] Id. Eldon, Chancellor, says: "If the doctrine of Lord Chief Justice Eyre is right, and I think it is, that publications may be of such a nature that the author can maintain no action at law, it is not the business of this court, even upon the submission in the answer, to decree either an injunction or an account of the profits of works of such a nature that the author can maintain no action at law for the invasion of that which he calls his property, but which the policy of the law will not permit him to consider his property. It is no answer that the defendants are as criminal. It is the duty of the court to know whether an action at law would lie; for, if not, the court ought not to give an account of the unhallowed profits of libelous publications."

[3] Universities etc. v. Richardson, 6 Ves. 689.

[4] Baker v. Taylor, 2 Blatch. 82.

[5] 2 Story's Eq. § 942; Mawman v. Tegg, 2 Russ. 390. And see Jarrold v. Houlston, 3 Kay & J. 708.

as are applicable to the malicious or wanton confusion of property.[1]

§ 653. We have already seen that extracts and quotations may be allowed within certain limits, the real question in such cases being whether substantial damage is done to the original work.[2] But a newspaper has been restrained from the publication of copious extracts from a novel, which were copied without criticism.[3] And the copying of reports of law cases will also be restrained.[4] So, although the opinions of the judges are not susceptible of copyright, yet where, under a contract with the proper state officers, made under the laws of the state, a publisher is entitled to the exclusive benefit of the copyright of the notes, references and other matters susceptible of copyright, in the reports of the state, equity will enjoin other publishers from infringing upon this right.[5] And this will be done even though the copyright be taken in the name of the state.[6] Even an acknowledgment of the extracts in such case affords no justification for the piracy. And the court will interpose to restrain the piracy of a court calendar, the individual work being regarded as a proper subject of copyright, although the general subject, as in the case of a chart or map, is open to all.[7]

§ 654. In the case of musical compositions, it has been held, that although the music may be adapted and modeled to a purpose other than that for which it was originally designed, yet if it may still be recognized by the ear as the same music, a case is established for the aid of equity.[8] But where it is sought to restrain the infringement of a musical composition, and the evidence is conflicting as to the originality of the work, a decision upon the question of the injunc-

[1] Mawman *v.* Tegg, 2 Russ. 390.
[2] See § 646, *ante.*
[3] Dickens *v.* ——, cited 8 L. J. Ch. N. S. 141.
[4] Sweet *v.* Shaw, 1 Jur. 917.
[5] Little *v.* Gould, 2 Blatch. 165.
[6] Id.
[7] Longman *v.* Winchester, 16 Ves. 269.
[8] Chappell *v.* Davidson, 2 Kay & J. 123.

tion will be suspended, in order that an issue at law may be tried to test the question of fact.[1] But it has been held that one who affixes to an old air a prelude and accompaniment of his own, combining the whole with words of his own composition, acquires a copyright in the production.[2] Though the publication of certain airs from an opera, in the form of waltzes and quadrilles, the opera being protected by copyright, will be enjoined as a piracy.[3]

§ 655. The owner of the copyright in a play is entitled to protection, and where he also has the copyright of a novel founded upon the play, he may enjoin a version of the novel which has been dramatized from the materials of both play and novel.[4] But if complainant fails to make sufficient proof of his title, either by authorship or purchase, and the facts indicate that his dramatic composition is a mere colorable imitation of that which he seeks to restrain, the injunction will not be granted.[5] And mere spectacles or arrangements of scenic effect, commonly called spectacular dramas, having no literary character, are not dramatic compositions within the meaning of the law, and will not be protected.[6]

§ 656. It has been held that a *bona fide* abridgment is not such a piracy as equity will restrain.[7] This doctrine must, however, be received with many qualifications, and grave doubts have been entertained, both in England and America, of the correctness of the principle.[8] In order to constitute such an abridgment as will not be a piracy, there

[1] Jollie *v.* Jaques, 1 Blatch. 618.

[2] Lover *v.* Davidson, 1 C. B. N. S. 182.

[3] D'Almaine *v.* Boosey, 1 Y. & C. 288.

[4] Reade *v.* Lacy, 1 J. & H. 524.

[5] Martinetti *v.* Maguire, 1 Abb. U. S. R. 356.

[6] Id. This decision, however, was under the act of congress of August 18, 1856, 11 Statutes at Large, 138, which grants protection to dramatic compositions "designed or suitable for representation"; these words are not found in the statute of July 8, 1870.

[7] Gyles *v.* Wilcox, 2 Atk. 141; Bell *v.* Walker, 1 Bro. C. C. 451. And see Campbell *v.* Scott, 11 Sim. 31.

[8] Gray *v.* Russell, 1 Story R. 11; D'Almaine *v.* Boosey, 1 Y. & C. 288; Dickens *v.* Lee, 8 Jur. 184. And see Wheaton *v.* Peters, 8 Pet. 591.

must at least be a substantial condensation of the materials used by the original author.[1] And if the condensation be merely colorable, as by the omission of certain parts of the work, that the remainder may be presented in a smaller compass, it is still a piracy.[2]

§ 657. A distinction has been drawn between a compilation and an abridgment, and it is held that, while a fair abridgment may, under certain circumstances, be allowed, yet if the plan and classification of the original work are adopted, and such copious extracts made as to render the new work a mere compilation, equity will interpose.[3] And where part of a book is a piracy, and the remaining portions are not, the injunction will be granted against the pirated matter.[4]

§ 658. A publication consisting partly of original matter and partly of compilations and selections from former works, may be the subject of copyright, and as such entitled to protection in equity. And where a large proportion of defendant's work has been made up from such a publication, with no other labor than that of copying and arranging the matter in such form as suited the compiler, it will be enjoined as an infringement.[5] So upon a bill to enjoin the publication of an abridgment of law reports, the bill alleging defendant's work to be merely a colorable abridgment, omitting some parts of the cases, the chronological order and arrangement of the work being artificially changed to an alphabetical arrangement, under heads and titles, so as to give it the appearance of a new work, an injunction may be allowed.[6]

§ 659. Where the alleged piracy consisted in the publication of a spelling book containing alterations and improvements from former works of the same nature, and defendant had been allowed to publish it for two years without objection, an injunction was refused, and complainant left to his remedy

[1] Folsom v. Marsh, 2 Story R. 107.
[2] Gyles v. Wilcox, 2 Atk. 141; Gray v. Russell, 1 Story R. 11.
[3] Story's Ex'rs. v. Holcombe, 4 McLean, 306.
[4] Id.
[5] Lewis v. Fullarton, 2 Beav. 6.
[6] Butterworth v. Robinson, 5 Ves. 709.

at law.[1] And where the matter alleged to be pirated forms a very inconsiderable portion of the work, consisting merely of arithmetical calculations which may be again computed by a few hours labor, and thus give defendant an unquestioned right to their publication, complainant having for a number of years lain upon his rights without objecting, an injunction will be refused.[2] So an injunction has been refused which was sought for the protection of a work giving interest tables with calculations of interest on money for different periods.[3] And generally it may be said that a court of equity, in the exercise of its discretion as to interfering by injunction before the legal right is established, will not enjoin an alleged infringement of a copyright, before action at law, where complainant's conduct has been such as to induce defendants to believe that their publication would not be interfered with.[4] Thus, where the owner of a copyright has, for a considerable period of time, permitted persons to copy cases from his works without objection, he will not be allowed to enjoin other parties from transcribing cases from the same work, until he has first established his title at law.[5]

§ 660. The question of piracy is to be considered as confined to the multiplication of copies of the original work; any use of the original, other than multiplying it, whether by public readings or recitations, or even by the representation of a play founded upon or derived from the work, does not constitute such an infringement as equity will restrain.[6] This doctrine is to be understood, however, as subject to the limitation that no copies are to be distributed among the audience.[7] And it has been held that the multiplication of copies, in the absence of any intention to sell them, is never-

[1] Assignees etc. v. Wilkins, 8 Ves., note to page 224, second English edition.

[2] Baily v. Taylor, 1 Russ. & M. 73, Taml. 295.

[3] King v. Reed, 8 Ves., note to page 223, second English edition.

[4] Saunders v. Smith, 3 Myl. & Cr. 711. And see Bramwell v. Halcomb, Ib. 737.

[5] Saunders v. Smith, 3 Myl. & Cr. 711.

[6] Reade v. Conquest, 9 C. B. N. S. 755; Tinsley v. Lacy, 1 Hem. & M. 747.

[7] Id.

theless an infringement.[1] And where the injunction is continued, subject to complainant bringing his action at law, defendant will not be allowed, without complainant's consent, to continue the sale of the work on condition of keeping an account.[2]

§ 661. One who is employed by government to make drawings and sketches, under a contract giving the exclusive property therein to the government, is not entitled to a copyright, and can not enjoin the publication by private parties of such drawings, especially where he has been employed by defendants to prepare the drawings for publication.[3] But a copy of a calendar or directory, with merely colorable variations, is a piracy which equity will enjoin.[4]

§ 662. It is not incumbent upon complainant to specify in his bill the particular parts of his work alleged to be pirated, and a general allegation that the publication complained of contains passages from his own, will suffice.[5] If complainant's title is merely equitable, the owner of the legal title

[1] Novello *v.* Sudlow, 12 C. B. 177.

[2] Sweet *v.* Maugham, 11 Sim. 51.

[3] Heine *v.* Appleton, 4 Blatch. 125.

[4] Matthewson *v.* Stockdale, 12 Ves. 270. This was a bill for an injunction to restrain the infringement of a copyright of an East India calendar or directory, on the ground that the variations from the original were merely colorable. It being objected that the work was not susceptible of copyright, Erskine, Chancellor, in granting the injunction, said that in the case of Dr. Trusler's chronology, all the remarkable events, the accounts of eminent persons, every matter of curiosity and interest, were subjects of information past and gone by, which could not be altered. All human events are equally open to all. Dr. Trusler finally had the decision in his favor. The next was the case of a map. How is it possible to have a copyright in the Island of St. Domingo? Must not the mountains have the same position, the rivers the same course? The answer was that the subject of the plaintiff's claim was a map, made at great expense, from actual surveys. The defendant's map was a servile imitation. In the case of the chart of the English Channel, must not the latitude and longitude of the several points upon the adjoining shores and the soundings, be the same as they were placed by nature? They must be the same, or the chart must destroy the mariner. What room then can there be for originality? That may be a reason for not making a new chart, but it is no reason for a servile imitation.

[5] Sweet *v.* Maugham, 11 Sim. 51.

should be joined as a party.[1] But if a complete and final legal assignment has been made, the assignor may be omitted.[2]

§ 663. Closely allied to the jurisdiction of equity in cases of infringement of copyright, is its power to restrain the publication of unpublished manuscripts, the jurisdiction resting upon the same foundation of the prevention of irreparable mischief and vexatious litigation.[3] The author of manuscript treatises, having a right of property therein, it is obvious that he is entitled to protection in the enjoyment of such right, even though his manuscripts may be deposited in the possession of a third person, with authority to copy them.[4] And where a copy of an unpublished treatise has been granted to another for a particular purpose, other than publication, such a grant may not be construed into a general authority to publish the work, and equity will, under such circumstances, restrain its publication.[5]

§ 664. Equity will also restrain the publication of private letters, on the ground of a right of property in the author, it being held that the receiver of the letters only acquires a special property in them, which does not justify their unauthorized publication. Even though the receiver of the letters be considered in the position of a joint owner with the writer, yet his publication of the letters without the writer's consent is such a violation of the rights of literary property as to warrant the exercise of the strong arm of equity for its restraint.[6] It is to be observed, however, that the interference will not be exercised on the ground of wounded feelings, or of violated friendship, but only for the protection of property rights.[7] And the jurisdiction rests upon no

[1] Colburn v. Duncombe, 9 Sim. 151.

[2] Sweet v. Maugham, 11 Sim. 51.

[3] 2 Story's Eq. § 943.

[4] 2 Story's Eq. § 943.

[5] Queensberry v. Shebbeare, 2 Eden, 329. Prince Albert v. Strange, 1 Mac. & G. 25.

[6] Pope v. Curl, 2 Atk. 342; Thompson v. Stanhope, Amb. 737; Granard v. Dunkin, 1 Ball & Beatty's R. 207; Perceval v. Phipps, 2 Ves. & B. 19.

[7] Gee v. Pritchard, 2 Swanst. 422.

broader foundation than that of copyright in the letters as literary productions, or of property in the paper on which they are written, a distinction being observed between letters having the characteristics of literary compositions, and merely friendly or private letters on domestic and business affairs. And while the unauthorized publication of the former class will be restrained, on the principles above stated, equity will not interfere with the latter, even though the publication constitutes a gross violation of honor and trust.[1]

§ 665. It has been held that where the publication of letters would be a violation of a trust or confidence which is founded on contract, the injunction may be allowed.[2] Nor is the exercise of the jurisdiction confined to cases where the relief is sought by the writer of the letters, but the receiver

[1] Wetmore *v.* Scovell, 3 Edw. Ch. 515; Hoyt *v.* Mackenzie, 3 Barb. Ch. 320. And see Brandreth *v.* Lance, 8 Paige, 24. Mr. Justice Story, however, has expressed himself strongly and feelingly in favor of a contrary doctrine, and has sought to sustain the jurisdiction of equity to restrain the publication of merely private and personal letters, lacking the attributes of literary compositions, on the ground of wounded feelings and injured confidence. See 2 Story's Eq. §§ 946, 947, 948. See, also, Folsom *v.* Marsh, 2 Story R. 100. But, while we must agree with this learned commentator that, "in a moral view the publication of such letters, unless in cases where it is necessary to the proper vindication of the rights or conduct of the party against unjust claims or injurious imputations, is, perhaps, one of the most odious breaches of private confidence, of social duty, and of honorable feelings, which can well be imagined," yet the weight of authority is clearly opposed to the exercise of the jurisdiction on such grounds. With the exception of Woolsey *v.* Judd, 4 Duer, 389, 11 How. Pr. 49, and Eyre *v.* Higbee, 35 Barb. 502, 22 How. Pr. 198, neither of which cases was in a court of last resort, it is believed that no decisions, English or American, can be found to sustain the doctrine of Justice Story. Even the cases cited would seem to rest largely upon the foundation of literary property. The doctrine as stated in the text has the sanction of an unbroken current of authority, beginning with the decision of Lord Eldon in Gee *v.* Pritchard, 2 Swanston, 428. The rule as laid down by McCoun, Vice Chancellor, in Wetmore *v.* Scovell, 3 Edw. Ch. 515, may, therefore, be considered as well established, that, "independent of property and disconnected therefrom, there is no ground or principle on which the jurisdiction to restrain the publication of private letters can properly rest."

[2] 2 Story's Eq. § 949.

may invoke the aid of equity to restrain their unauthorized publication.[1] But private letters obtained from an agent, if not published for profit, but in vindication of defendant's character, which has been aspersed by complainant, will not be restrained.[2] And it would seem that scientific lectures, delivered orally, may not be published for profit, or sold for publication, by those entitled to hear them.[3] And students, who have been permitted to copy the system of their instructor in a particular art, will be restrained from its publication, as a fraud upon his rights of property, since an author's use of his manuscripts in the way of instruction is not an abandonment of them to the public.[4] So, too, the unauthorized publication of a play, from its representation at a theater, or its production at a theater other than that authorized by the author, is a piracy.[5]

§ 666. Equity will not usually interfere to restrain the publication of a work of a libelous nature,[6] even though the party against whom the libel is directed will be injured in character and person by its publication.[7] The reasons for refusing the relief in this class of cases are of a two-fold nature: first, that property rights constitute the sole ground of interference; and second, that the remedy for the supposed libel is ample at law.[8]

§ 667. While the publication of an original work of the same nature, and under a similar title to that of complainant, will not be enjoined, an injunction may properly be allowed to restrain defendant from publishing a magazine as a continuation in successive numbers of complainant's magazine,

[1] Granard v. Dunkin, 1 Ball & Beatty's R. 207; Thompson v. Stanhope, Amb. 737.

[2] Perceval v. Phipps, 2 Ves. & B. 19.

[3] Abernethy v. Hutchinson, 3 L. J. R. Ch. 209.

[4] Bartlette v. Crittenden, 4 McLean, 300.

[5] Morris v. Kelly, 1 Jac. & W. 481.

[6] Clarke v. Freeman, 11 Beav. 112; Mulkern v. Ward, before Vice Chancellor Bacon, reported in 4 Chicago Legal News, 440.

[7] Brandreth v. Lance, 8 Paige, 24. But see, *contra*, Dixon v. Holden, L. R. 7 Eq. 488.

[8] Brandreth v. Lance, 8 Paige, 24.

and also to prevent the publication by defendant of communications received by him while publishing for complainant.[1]

§ 668. Independent of copyright laws, an author has an unquestioned property in his works, until publication, by the common law, in which right he will be protected.[2] Copyright laws are merely ancillary to the common law rights of authors, continuing such rights after publication in print, but in no way impairing them while the literary composition remains in manuscript. And the public representation of a play at a theater is not such a publication as will deprive the author of his common law right. And one who has possessed himself of the words and arrangement of a drama, from persons who had seen it publicly performed, will be restrained from its publication without the author's consent.[3]

[1] Hogg *v.* Kirby, 8 Ves. 215.

[2] Millar *v.* Taylor, 4 Burr. 2303; Woolsey *v.* Judd, 4 Duer, 389; Boucicault *v.* Wood, 16 Am. Law Reg. 539. And see Keene *v.* Wheatley, 9 Am. Law Reg. 33.

[3] Palmer *v.* Dewitt, 2 Sweeny, 530, 3 Albany Law Journal, 54, decided in the Superior Court of New York City, December Term, 1870. And see as to unauthorized representation of a play, Morris *v.* Kelly, 1 Jac. & W. 481. In Palmer *v.* Dewitt complainant alleged that he had purchased the exclusive right of producing in the United States an unpublished comedy called "Play;" that the play had been produced by the author in England and by complainant in the United States, but with no intention of abandoning it, or of conferring upon any one the right of printing or publishing, and that defendant, in disregard of complainant's proprietary right, and without his knowledge or consent, had published and sold copies of the drama. The answer of defendant denied that the public representation of the play by the author did not confer upon or abandon to defendant the right of publishing, and alleged that the play had been many times performed in public in England, without any notice or prohibition to the spectators against carrying it away, by memory or otherwise, and using or publishing it. Defendant further alleged that he received the words of the play and its arrangement, divisions and stage directions from persons who had obtained them by witnessing its performance on the stage as spectators. Monell, J., delivering the opinion of the court, says: * * * "There can be no fixed rule determining when an author has surrendered his literary property. Printing his composition, and giving it public circulation, would fix the period of surrender in such a case; but one reading of a manuscript lecture, or one performance of a manuscript play, would not; and if one does not, what greater number, can it be said, will? The value,

§ 669. Where an author has sold and assigned the copyright of his work, published in his name, and has bound

to the author, of a lecture or of a play, who derives emolument from its delivery or representation before public audiences, is not limited to one performance. It may extend to any greater number, and the hundredth performance may bring more ample returns than the first. So that it may fairly be assumed, that it is not intended, in any case, to surrender property in a literary composition, so long as the author of it retains it in manuscript, and uses it before the public for his private pecuniary benefit. Therefore, I think there can be no presumption against literary ownership arising from the mere frequency of performance. Such performances are not inconsistent with a continued proprietorship, but are wholly consistent with, and necessary to, the enjoyment of the property. * * * Upon the subject of publication, I will here refer to some of the cases, either holding or sustaining that a representation of a play is not necessarily a publication of it, so as to deprive the author of his property in it. Judge Sprague so held in Roberts *v.* Meyers, 23 Monthly Law Reg. 396. He said it was not a publication within the meaning of the copyright law, and did not prevent an author from obtaining a copyright. It is affirmed by Judge Hoar, in Keene *v.* Kimball, 23 Monthly Law Reg. 669, where he says: 'The representation of a dramatic work upon the stage is not a publication which will deprive the author or his assignees of their right of property.' In Bartlette *v.* Crittenden, 4 McLean, 300, 5 Ib. 32, it was held that the author of a lecture did not dedicate the manuscript to the public by using it for the purpose of instructing others. That case went further, and decided that an author did not abandon his right in his composition by permitting pupils or friends to take copies; and that such copies could not be used in any way not contemplated by the author. And in Blunt *v.* Patten, 2 Paine, 397, a deposit by the author of his work in a public office, such as a chart in the navy department, was held not to make it a public document, which any one might copy. And, again, in Boucicault *v.* Wood, 16 Am. Law Reg. 539. In a very recent case (Crowe *v.* Aiken, not reported), decided by Judge Drummond, in the circuit court of the United States for the district of Illinois, an injunction was asked for to restrain the represention by the defendant of the play called 'Mary Warner.' The play was written by Mr. Taylor for Miss Bateman, and the manuscript was transferred to the plaintiff. It was publicly represented in London and in the United States, but was not printed. The defendant alleged that the play was obtained from a person in London, who procured it from repeated representations on the stage at the Haymarket Theater, and that there was no 'no restriction' against any of the spectators using such play as they saw fit. After a lengthened examination of the questions, the court decided to grant the injunction. In the opinion, the ground is distinctly taken, that a representation is not a publication, and any manner of obtaining it, without the consent of the author or owner, 'except by memory,' is a violation of his proprietorship. As far

himself by express agreement not to publish any work prejudicial to the sale of the first, a publisher who, with notice of

therefore, as this case depends upon an actual or constructive publication of the play by the plaintiff or his assignee, the clear weight of authority is, that public representation is not publication, and does not entitle any person, without the author's consent, to procure it in any way for purposes of publication, except, perhaps, when it is procured by means of the memory alone. I am aware that in the case of Keene *v.* Wheatley, 9 Am. Law Reg. 92, which is followed by Keene *v.* Clarke, 5 Rob. N. Y. 38, and again by Crowe *v.* Aiken, each of the learned judges leans to the opinion that an auditor may use his memory as a means of procuring a represented play, and may then lawfully print and publish it. The reason seems to be, that as there can be no power over or restriction of the use of the memory, therefore such use is not unlawful. It is enough, however, perhaps, for the present case, to say that, even if it is true that an auditor at a public representation may lawfully carry away the play in his memory, and afterward put it in writing, and from such writing print and publish, there was no evidence in this case to bring it within that rule. The finding of the court is, that the defendant received the words of the comedy, etc., from one or more persons who had seen or heard it performed. That finding is not enough to justify the conclusion that the person or persons who saw or heard the public performance had brought it in their memories from the theater. The burden of proving the manner in which the play was procured was upon the defendant, and he was bound to show that he had obtained it in a lawful way. There are no presumptions in his favor. The right of the plaintiff as owner, before publication, was absolute, and could be defeated only by showing that the defendant had obtained the play through the memory of an auditor. This is the result of the learned opinion of Judge Cadwallader in Keene *v.* Wheatley, *supra*, in which view he has fortified himself by the citation of many cases; and also of Judge Drummond, in Crowe *v.* Aiken, *supra*. But I am compelled to dissent from the opinions of the learned judges in those cases, so far as it is intimated that a spectator may, upon witnessing the public performance of a play, rightfully commit it to memory, and then publish it to the world; and also from a qualified view of the same character, entertained by the learned late chief justice of this court, as expressed in his opinion in Keene *v.* Clarke, *ubi supra*. It seems to me that any surreptitious procuring of the literary property of another, *no matter how obtained*, if it was unauthorized and without the knowledge or consent of the owner, and obtained before publication by him, is an invasion of his proprietary rights, if the property so obtained is made use of to his injury. Each of the learned justices admits that a play can not lawfully be taken down by a short-hand writer from the lips of the actors during a public performance. If taken thus by a stenographer, is it different, in its legal effect and resulting consequences, from committing to memory and afterward writing it out? In principle it is not. They are only different modes of doing the same thing,

this covenant, subsequently publishes a work purchased from the same author, in the same name, and upon the same sub-

and if without the author's consent, are alike injurious to his interests. The objection is not to the committing a play to memory, for over that no court can exercise any control, but in using the memory afterward as the means of depriving the owner of his property. Such use, it seems to me, is as much an infringement of the author's common law right of property, as if his manuscript had been feloniously taken from his possession. I can see no difference. In the case of Prince Albert *v.* Strange, 2 De G. and Sma. 652, a workman employed to take impressions from copper plates of etchings made by the plaintiff, not intended for publication, took impressions for himself and sold them to the defendant. It was held an infringement of the plaintiff's proprietary right, and an injunction was granted and the impressions ordered to be destroyed. The pleadings and proofs in this case were shaped so as to bring it within one of the propositions of the learned late chief justice in Keene *v.* Clarke, and it is accordingly found as a fact that the tickets admitting spectators to the performances contained no notice or prohibition against carrying the comedy away, by memory or otherwise, and using and printing the same, nor was any notice to that effect posted in the theater in the view of the spectators. Whatever means a prudent man may adopt to prevent his property from being feloniously taken from him, it can not, I think, be successfully contended, that, if he chooses to take the risk, he may not leave it exposed without mark or other sign to designate it as his property; or that, by thus exposing it, he would lose his title, and could not afterward recover it, or its value, from one who tortiously took it. A wrongdoer can not get title to property, or escape the responsibility of his tortious or felonious act, merely because the owner has failed to give public notice or warning that it was not to be stolen. If carrying away in the memory of a spectator, or otherwise surreptitiously obtaining the contents of a play, is without the consent of, or unauthorized by, the owner, and therefore an infringement of his property in the play, the act is not excused by the omission of the owner to notify the audience that they will not be allowed, or are forbidden, to carry it away in that manner. Upon a careful consideration, therefore, of the subject, I have not been able to appreciate the distinction which the learned judges in Keene *v.* Wheatley and Keene *v.* Clarke and Crowe *v.* Aiken have attempted to draw between different modes of obtaining the contents of a manuscript play from its public performance. They are equally objectionable, and are merely different modes of depriving an author of his literary property; and, therefore, any mode which effectuates that purpose is unlawful. The vice-chancellor says, in Prince Albert *v.* Strange, *supra*, (p. 689), that as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, a person who, without the owner's consent, express or implied, *acquires a knowledge of, can not lawfully avail himself of the knowledge so acquired* to publish, without his consent, a descrip-

ject, will be enjoined, although the latter work is not a piracy of the former and is published under a different title.[1] But the rule would seem to be otherwise where the publisher purchases the rival work in good faith, and without notice of the covenant on the part of the author.[2] And where the proprietor of a weekly periodical assigns his copyright and entire interest, for valuable consideration, and at the same time agrees not to publish any weekly periodical of like nature, he may be enjoined from publishing a daily journal under the same name and at the same price, complainant undertaking to abide by the order of the court as to damages, and to bring his action at law against defendant within one week.[3]

§ 670. The question as to whether a translation of a copyrighted work is or is not such an infringement as to entitle

tion of the property. That opinion goes quite as far as is necessary to destroy the distinction alluded to. There is another case to the same effect. In Turner v. Robinson, 10 Irish Ch. 121, a painting, on public exhibition for private emolument, was seen by spectators, some of whom from recollection, arranged themselves in tableau, representing the figures in the painting, and were photographed. The sale of engravings made from such photographs was restrained by injunction. The mode adopted for carrying into execution what was denounced by the court as an unlawful act, was the same in the Irish case as was approved of in the two cases alluded to, namely, in the memories of the spectators; and the case is therefore opposed, as an authority, to the distinction referred to. My conclusions upon the whole case are, that there was no such publication by the plaintiff, or by his assignor, of the play in question, as to deprive the plaintiff of his common law right of property in it. That public representations of the play were not a publication of the play so as to take away such common law right. That there is no presumption in favor of the lawfulness of the manner in which the defendant obtained the play. That the burden is upon him to show that it came into his possession in a lawful manner; and that, having failed to show the lawfulness of his possession, he should be deprived of it. I am therefore of opinion, that the plaintiff is entitled to a judgment restraining the defendant from further printing or publishing the play, and requiring him to deliver up to be destroyed such as are now in print, and that, therefore, the judgment appealed from should be reversed."

[1] Barfield v. Nicholson, 2 L. J. Ch. 90.

[2] Id.

[3] Ingram v. Stiff, 5 Jur. N. S. 947.

the author to the protection of equity, has seldom been presented as a direct question for the decision of the courts, though numerous *dicta* may be found in the adjudicated cases bearing more or less directly upon the subject.[1] In this country, however, the law may be regarded as settled, that a translation is not such an infringement as to call for the aid of equity, and it will not be enjoined. The rule is based upon the reasoning, that an author can claim no literary property, after publication, in his ideas, thoughts, or sentiments, apart from the language and outward semblance in which they are couched; and that when he has sold his book, the only property which he can reserve to himself, or in which the law will protect him, is the exclusive right to multiply copies of the particular combination of characters in which his ideas are clothed.[2]

[1] Millar *v.* Taylor, 4 Burr, 2303; Murray *v.* Bogue, 1 Drew. 353; Prince Albert *v.* Strange, 2 DeGex & S. 652; Wyatt *v.* Barnard, 3 Ves. & B. 77; Burnett *v.* Chetwood, 2 Meriv. 441, note.

[2] Stowe *v.* Thomas, 2 Am. Law Reg. 210. This was a bill for an injunction, alleging that complainant was the author and proprietor of a work called "Uncle Tom's Cabin," which was duly copyrighted, and that defendant had translated the same into German, and printed, published and sold it, both in newspaper and pamphlet form. The answer admitted the facts, but denied that they constituted an infringement. The relief was denied, Grier, J., observing as follows: * * * "An author may be said to be the creator, or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book and given his thoughts, sentiments, knowledge or discoveries to the world, he can have no longer an exclusive possession of them. Such an appropriation becomes impossible, and is inconsistent with the object of publication. The author's conceptions have become the common property of his readers, who can not be deprived of the use of them, or their right to communicate them to others clothed in their own language, by lecture or by treatise. The claim of literary property, therefore, after publication, can not be in the ideas, sentiments, or the creations of the imagination of the poet or novelist, as dissevered from the language, idiom, style or the outward semblance and exhibition of them. His exclusive property in the creation of his mind, can not be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to

§ 671. The province of courts of equity being to afford relief in cases where no remedy exists at law, or where the legal remedy, if any, is inadequate or incapable of being

multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright. See Curtis on Copyright, 9, 10, 11, etc." * * * "The notion that a translation is a piracy of the original composition, is founded on the analogy assumed between copyright and patents for inventions, and where the infringing machine is only a change of the form or proportions of the original, while it embodies the principle or essence of the invention. But as the author's exclusive property in a literary composition, or his copyright, consists only in a right to multiply copies of his book, and enjoy the profits therefrom, and not in an exclusive right to his conceptions and inventions, which may be termed the essence of his composition, the argument from the supposed analogy is fallacious. Hence, in questions of infringement of copyright, the inquiry is not whether the defendant has used the thoughts, conceptions, information or discoveries promulgated by the original, but whether his composition may be considered a new work requiring invention, learning and judgment, or only a mere transcript of the whole or parts of the original, with merely colorable variations. Hence, also, the many cases to be found in the reports, which decide that a *bona fide* abridgment of a book is not an infringement of copyright. To make a good translation of a work, often requires more learning, talent and judgment than was required to write the original. Many can transfer from one language to another, but few can translate. To call a translation of an author's ideas and conceptions into another language, a copy of his book, would be an abuse of terms. and arbitary judicial legislation." * * * "The distinction taken by some writers on the subject of literary property, between the works which are *publici juris*, and those which are subject to copyright, has no foundation in fact, if the established doctrine of the cases be true, and the author's property in a published book consists only in a right of copy. By the publication of her book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much *publici juris*, as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, playwrights and poetasters. They are no longer her own—those who have purchased her book may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished; and all that now remains is the copyright of her book, the exclusive right to print, re-print and vend it; and those only can be called infringers of her right, or pirates of her property, who are guilty of printing, publishing, importing or vending without her license 'copies of her book.' In topical, but not very precise phrase-

enforced, the possession of the legal title is not indispensable to obtaining relief in equity against the infringement of a copyright, and the courts have been disposed to extend their aid upon the application of persons having only an equitable title.[1] And the assignee of the copyright in a law report is entitled to the protection of his rights by injunction, even though at the time of the alleged piracy no written assignment existed, and complainant's title was merely equitable.[2] And in such case, the author's permission to infringe the copyright, given after he has parted with his equitable title for a valuable consideration, constitutes no bar to the relief, it appearing on the title page of the work that it is published for the equitable assignee and owner of the copyright.[3] So the performance of a play may be enjoined, where the copyright has been assigned by the author to persons who afterward assign in writing to complainants, though the original assignment may not have been in writing.[4]

ology, a translation may be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book. The plaintiff's bill is therefore dismissed with costs."

[1] Mawman v. Tegg, 2 Russ. 385; Chappell v. Purday, 4 Y. & C. 485; Hodges v. Welsh, 2 Ir. Eq. R. 266.

[2] Hodges v. Welsh, 2 Ir. Eq. R. 266.

[3] Id.

[4] Morris v. Kelly, 1 Jac. & W. 481.

CHAPTER XVI.

OF INJUNCTIONS TO RESTRAIN THE PIRACY OF TRADE MARKS.

§ 672. Definition of trade mark.
673. Name of town does not constitute trade mark.
674. Trade mark which is deceptive not protected.
675. Symbol, however unmeaning, entitled to protection; imitation with only colorable differences enjoined.
676. Injunction not allowed where right is doubtful.
677. General rule; foundation of the jurisdiction.
678. Piracy may consist in use of defendant's own name.
679. Intent immaterial.
680. Evidence of piracy.
681. Diligence necessary in seeking the relief.
682. Parties.
683. Assignee may enjoin; changes in firm.
684. Literary publications.
685. Conditions of the relief.
686. Partners.
687. Corporate name regarded as a trade mark.
688. Natural products entitled to protection.
689. Nice distinction.
690. Certificate of registry not conclusive; package.
691. Degree of resemblance.
692. Use of firm name.
693. Promises to refrain from piracy no bar to relief.
694. Account.

§ 672. A trade mark is a particular sign or symbol which, by exclusive use, becomes recognized as the distinguishing mark of the owner's goods, and for the protection of which the aid of equity may be properly invoked. It is not necessary that the article should have acquired a general notoriety in the market, by the use of the particular mark adopted, but the right may be established whenever the goods are brought

into market.[1] If the marks or devices used refer simply to the nature, kind, or quality of the articles, and do not designate the particular goods of the owner, or his particular place of business, he can not acquire such a property in the words or symbols used as to warrant the interposition of equity.[2] Thus, if the name used is simply descriptive of the article, or is the name by which it is generally known in trade, or indicates the general nature of the business, it is not a trade mark within the meaning of the rule.[3]

§ 673. A manufacturer can not acquire such an exclusive property in the name of a town where his goods are manufactured, as to entitle him to an injunction restraining other manufacturers in the same town from using the name of the town to designate the place of manufacture of their goods, there being no piracy of complainant's name.[4] But, though the manufacturer in selecting a term to distinguish his goods should select the name of a place familiarly known, yet if he imposes a new office or attribute upon the word, specially designating the origin and place of manufacture of the article, without infringing upon any previous use of the term by others, he may be protected by injunction.[5]

§ 674. In cases of interference to restrain the piracy of trade marks, a strict application is made of the rule that he who would have equity must do equity. And if complainant's trade mark contains in itself any misstatements tending to deceive the public, either as to the place where his goods are manufactured, or as to the quality and identity of the goods purchased, he is guilty of a fraud as well as defendant, and will not be protected.[6] So if a trade mark falsely represents

[1] M'Andrew v. Bassett, 33 L. J. Ch. 561.

[2] Stokes v. Landgraff, 17 Barb. 608; Corwin v. Daly, 7 Bosw. 222.

[3] Braham v. Bustard, 1 Hem. & M. 447; Young v. Macrae, 9 Jur. N. S. 322. And see London etc. v. London etc., 11 Jur. 938.

[4] Candee v. Deere, Supreme Court of Illinois, 10 Am. Law Reg. N. S. 694. And see Wotherspoon v. Currie, 23 L. T. N. S. 443.

[5] Newman v. Alvord, 49 Barb. 588.

[6] Palmer v. Harris, 60 Pa. St. 156; Pidding v. How, 8 Sim. 477; Flavel v. Harrison, 10 Hare, 467; Perry v. Truefitt, 6 Beav. 66; Leather etc. v. American etc., 11 H. L. 523.

the goods as patented, there being no patent, the owner is guilty of such misrepresentation as will debar him from relief.[1] But if in such case a court of equity is in doubt as to whether a court of law might not consider the party aggrieved entitled to some relief against defendant, for having used his name in connection with the sale of the article, the bill may be retained until an action at law can be brought to determine the right.[2] And the use of the word "patent" as part of a trade mark of goods which have never been patented, will not prevent a party from obtaining an injunction against the infringement of his trade mark, if the word has not been used in such manner as to deceive and mislead the public into the belief that the article was actually protected by patent.[3] Thus, the words "patent thread" may be used as part of a trade mark where they have long been employed in the trade as a term of art to designate a particular kind of thread, although it has never been patented.[4]

§ 675. However unmeaning or absurd the mark or symbol used may be in itself, it may still be the subject of a trade mark and entitled to protection.[5] It is to be observed, however, that the right is limited to the use of the symbol with reference to a particular line of goods, so that its use in connection with a different class of goods is not deemed a piracy.[6] But since the imitation of a trade mark with partial differences, such as would not be observed by the public, effects the same injury as an entire counterfeit, it follows that any imitation, with only a colorable difference in some of the details, will be restrained.[7] Thus, where defendant's trade

[1] Leather etc. v. American etc., 11 H. L. 523, 543; Flavel v. Harrison, 10 Hare, 467.

[2] Flavel v. Harrison, 10 Hare, 467.

[3] Marshall v. Ross, L. R. 8 Eq. 651.

[4] Id.

[5] Perry v. Truefitt, 6 Beav. 66; Braham v. Bustard, 1 Hem. & M. 477.

[6] Leather etc. v. American etc., 33 L. J. Ch. 199; Hall v. Barrows, Ib. 204; Braham v. Bustard, 1 Hem. & M. 447.

[7] Clark v. Clark, 25 Barb. 76; Brooklyn etc. v. Masury, Ib. 416; Williams v. Spence, 25 How. Pr. 366. And see Gillott v. Esterbrook, 47 Barb. 455. In Brooklyn etc. v. Masury, 25 Barb. 416, the plaintiff, an incorporated

mark is in all respects similar to that of complainant, except only in the use of the name, the injunction will be allowed.[1] While it is often a matter of great difficulty to determine what

company, had been engaged for over twenty years in manufacturing white lead in the city of Brooklyn, and was accustomed to mark its kegs "Brooklyn White Lead Company," or "Co." Defendant was engaged in the same business, and at the same place, though established for a less period of time, and the imitation complained of was in marking his kegs "Brooklyn White Lead and Zinc Company." The injunction was sustained on appeal to the Supreme Court, Mitchell, P. J., saying: "It is to protect the plaintiff's right of selling his own that the law of trade marks has been introduced. It must include a right to sell to all—to the incautious as well as to the cautious. Any false name that is assumed in imitation of a prior true name is in violation of this right, and the use of it should be restrained by injunction." The injunction was, however, modified so as to prevent the use of the word "Company," or "Co.," allowing the use of the remaining words.

[1] Gillott *v.* Esterbrook, 47 Barb. 455; Hostetter *v.* Vowinkle, 1 Dillon's C. C. 329. In this case an injunction was allowed to restrain an imitation of complainant's label resembling the original in all respects, except that the word "Hostetter" was changed to "Holstetter" and the words "Hostetter & Smith" were changed to "Holstetter & Smyth." The principles applicable to the infringements of trade marks are well laid down in this case by Dillon, J., as follows: "The law is well settled that a party who has appropriated a particular trade mark to distinguish his goods from other similar goods, has a right or property in it which entitles him to its exclusive use. This right is of such a nature that equity will protect it, by injunction, from invasion, and if it has been invaded, the wrongdoer is liable for the damage he has thereby caused the party whose trade mark he has adopted or illegally imitated; which damage will ordinarily be the loss of profits caused by the illegal or fraudulent infringement. Candee et al. *v.* Deere et al., Ill. Sup. Ct. 1871, 10 Am. Law Reg. N. S. 694; Motley v. Downman, 3 Myl. & Cr. 1; Millington *v.* Fox, Ib. 338; Eden on Injunc., ch. 14, p. 314; Story Eq. Jurisp. § 951; Taylor *v.* Carpenter, 2 Woodb. & M. 1; Walton *v.* Crowley, 3 Blatchf. 440; Coffeen *v.* Brunton, 4 McLean, 518; Seixo *v.* Provezende, 1 Ch. Ap. 194; Amoskeag Manufg. Co. *v.* Spear, 2 Sandf. S. C. R. 606; Filley *v.* Fassett, 8 Am. Law Reg. (N. S.) 402, 44 Mo. 168, and cases cited; Gillott *v.* Esterbrook, 47 Barb. 469; Burnett *v.* Phalon, 9 Bosw. 192; Croft *v.* Day, 7 Beav. 89; Edleston *v.* Vick, 23 Eng. C. L. & Eq. 53. These cases and others, also show that it is not necessary to constitute an illegal infringement that the trade mark of the originator should be copied in every particular. It is sufficient to warrant equitable relief that it is likely to deceive or mislead the patrons of the originator, or make it pass with the public as his."

degree of resemblance will constitute a piracy, it is to be observed that the test is not whether a wary and cautious person would be likely to be misled by the imitation, but whether it is such as would deceive the unwary and careless.[1] And it should, at least, appear that the resemblance is such as to raise the probability of mistake on the part of the public, or of a design and purpose on the part of the defendant to deceive the public.[2] But, if the article is calculated to mislead the public, the intent with which it was manufactured does not signify, nor does it matter whether any person has actually been deceived, provided the resemblance is such as to mislead an ordinary purchaser.[3]

§ 676. Where the question as to defendant's right to use complainant's trade mark is not entirely free from doubt, the injunction will not be allowed if defendants are able to respond in pecuniary damages at law.[4] So if the question as to whether complainant's trade mark has actually been pirated in such a manner as to injure him and deceive the public is involved in doubt, or if it be doubtful whether complainant has such a legal right as would justify an injunction, the relief should not be allowed until the cause is heard upon pleadings and proof, or until complainant has established his right at law.[5] And, in general, it may be said that equity will not interfere where complainant's right is not clearly established, especially where it appears that both parties were originally concerned in the manufacture of the article as copartners.[6] But, in order to defeat complainant's right to appropriate a particular symbol or term on the ground of its

[1] Leather etc. v. American etc. 11 H. L. 523; Seixo v. Provezende, 1 L. R. Ch. Ap. 192; Williams v. Spence, 25 How. Pr. 366.

[2] McCartney v. Garnhart, 45 Mo. 593. And see Filley v. Fassett, 44 Mo. 168, a leading case.

[3] Leather etc. v. American etc., 11 H. L. 523.

[4] Howe v. Howe etc., 50 Barb. 236.

[5] Partridge v. Menck, 2 Barb. Ch. R. 101, 2 Sandf. Ch. 622; Spottiswoode v. Clark, 2 Ph. 154. But in the latter case it is held that defendant may in the meantime be required to keep an account.

[6] Coffeen v. Brunton, 5 McLean, 256.

having been previously in common use, it must appear that such use extended to and included complainants.[1]

§ 677. It may be laid down as a general rule that a manufacturer, adopting a certain trade mark and stamping it upon his goods, acquires the exclusive right to the use of that particular mark or symbol in connection with that particular class of goods, and that he is entitled to the interposition of a court of equity to enforce this right by perpetual injunction.[2] Even a system of numbers, if adopted and used for the purpose of designating the manufacturer's particular goods, comes within the rule and is entitled to protection.[3] But letters and numbers, or a combination of letters and numbers, used for the purpose of designating the size, shape and quality of a manufacturer's goods, do not constitute a trade mark and are not entitled to protection in equity.[4] The jurisdiction rests upon fraud on the part of the defendant,[5] and upon the principle that equity will not allow one to sell his own goods under the pretense that they are the goods of another.[6] And in addition to such a general resemblance of forms, words and

[1] Newman *v.* Alvord, 49 Barb. 588.

[2] Taylor *v.* Carpenter, 11 Paige, 292, affirmed by the court for the correction of errors; Hostetter *v.* Vowinkle, 1 Dillon's C. C. 329.

[3] Ainsworth *v.* Walmsley, 1 L. R. Eq. 518.

[4] Candee *v.* Deere, Supreme Court of Illinois, 10 Am. Law Reg. N. S. 694.

[5] Delaware *v.* Clark, 7 Blatch. 112.

[6] Perry *v.* Truefitt, 6 Beav. 66. Lord Langdale, Master of the Rolls, observes: "I think that the principle on which both the courts of law and equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretense that they are the goods of another man; he can not be permitted to practice such a deception, nor to use the means which contribute to that end. He can not, therefore, be allowed to use names, marks, letters, or *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using the particular name or mark."

symbols as to mislead the public, there must be, to constitute a piracy, such a distinctive individuality as to procure for the person the benefit of the deception which such general resemblance will produce.[1] It is wholly immaterial whether the simulated article is or is not inferior to or of equal quality with the genuine.[2] But the injunction will not be granted where its effect would be to restrain the sale of a genuine article and aid in the sale of a simulated one.[3] Nor will equity interfere where defendant has acted under such acquiescence on the part of complainants as is equivalent to a license.[4]

§ 678. The protection afforded by courts of equity against the infringement of trade marks, is not dependent upon any exclusive right to a particular name or to a precise form of words. The right to relief is rather dependent upon the necessity of extending protection against the commission of fraud, and this fraud may consist in the use of a name to which defendant is entitled, if such use be coupled with other circumstances rendering it an infringement of complainant's rights. Thus, where defendant has used his own name in the trade mark, to restrain the use of which the injunction is prayed, but has used it in such a connection and under such circumstances as are calculated to mislead the public, and to enable him to obtain for himself a benefit to which he is not entitled in equity and good conscience, he will be enjoined.[5]

[1] Croft *v.* Day, 7 Beav. 84; Colladay *v.* Baird, 7 Upper Canada Law Journal, 182.

[2] Taylor *v.* Carpenter, 11 Paige, 292; Coats *v.* Holbrook, 2 Sandf. Ch. R 586.

[3] Samuel *v.* Berger, 24 Barb. 163.

[4] Delaware etc. *v.* Clark, 7 Blatch. 112.

[5] Croft *v.* Day, 7 Beav. 84. This was a bill for an injunction under the following circumstances: An establishment for the manufactory of blacking had for many years been carried on under the name of Day & Martin, at 97 High Holborn, London. Upon the death of Day and Martin the business was conducted by Day's executors in the same name. A nephew of the deceased Day applied to another person named Martin for permission to use his name in the manufacture and sale of blacking, and permission was granted. Day then commenced the manufacture of blacking at 90½ Holborn Hill, and sold his blacking under the name of Day &

§ 679. We have already seen that the intent with which the piracy was committed does not signify, and it may be laid

Martin, using similar bottles and almost identical labels with those used by the original Day & Martin, the labels being of exactly the same size and color and with the letters arranged in precisely the same manner. The injunction was allowed, Lord Langdale, Master of the Rolls, saying: "The accusation which is made against this defendant is this: that he is selling goods, under forms and symbols of such a nature and character, as will induce the public to believe that he is selling the goods which are manufactured at the manufactory which belonged to the testator in this cause. It has been very correctly said that the principle, in these cases, is this: that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that, in my opinion, the right which any person may have to the protection of this court, does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others. It is perfectly manifest, that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public. And, secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. To have a copy of the thing would not do, for though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary, in the first instance, to mislead the public, and in the next place, to secure a benefit to the party practising the deception by preserving his own individuality. There are many distinctions, even more than have been stated, between these two labels. It is truly said, that if any one takes upon himself to study these two labels he will find several marks of distinction. On the other hand, the colors are of the same nature, the labels are exactly of the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or bottles in which the blacking is put. It appears, therefore, to me that there is quite sufficient to mislead

down as a general rule that, to constitute piracy of a trade mark, no fraudulent intent is necessary, and the injunction may be granted, even though defendant was ignorant that the devices or symbols used were the property of another.[1] But where two persons of the same name manufacture the same article, calling it by their name, the later manufacturer will not be enjoined in the absence of evidence that he has represented his own article as that of the elder manufacturer.[2] But where defendant is asked for complainant's goods, and offers his own instead, sufficient proof of fraud is afforded, even though he should not represent the article as complainant's.[3] And if the acts complained of have a tendency to mislead the public, a denial of fraudulent intent will not prevent equity from granting the relief.[4]

§ 680. The adoption of a particular brand, the effect of

the ordinary run of persons, and that the object of the defendant is, to persuade the public that this new establishment is, in some way or other, connected with the old firm or manufacturer, and at the same time to get purchasers to go to 90½ Holborn Hill, and not to 97 High Holborn. I think what has been done here is quite calculated to effect that purpose, and the defendant must be restrained. My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the names Day and Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not, in fair and honest dealing, entitled. Such being my opinion, I must grant the injunction restraining the defendant from carrying on that deception. He has the right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that or any other name calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself at the expense of the plaintiffs, an undue and improper advantage."

Millington *v.* Fox, 3 Myl. & Cr. 338; Rodgers *v.* Nowill, 6 Hare, 325; Leather etc. *v.* American etc., 11 H. L. 523; Coffeen *v.* Brunton, 4 McLean, 516; Davis *v.* Kendall, 2 R. I. 566; Partridge *v.* Menck, 2 Barb. Ch. 101, note.

[2] Burgess *v.* Burgess, 17 Eng. L. & Eq. 257. And see Holloway *v.* Holloway, 13 Beav. 209.

[3] Leather etc. *v.* American etc., 1 Hem. & M. 295.

[4] Edelsten *v.* Vick, 11 Hare, 84.

which would be to mislead the public, by inducing them to buy the goods as those of another person, will not be permitted.[1] And the making up of goods in a form resembling complainant's, or the use of similar wrappers or labels, whether the similarity consists in size, color, shape, or general appearance, will generally be considered strong presumptive evidence of piracy.[2] So the running of an omnibus, having names and devices similar to those of complainants, and sufficiently like them to deceive the public and draw away complainants' business, will be restrained.[3] So, too, the name

[1] Seixo v. Provizende, 1 L. R. Ch. Ap. 192.

[2] Croft v. Day, 7 Beav. 84; Holloway v. Holloway, 13 Beav. 209; Blofeld v. Payne, 4 B. & A. 410.

[3] Knott v. Morgan, 2 Keen, 213. This was a bill filed by the proprietors of the London Conveyance Company, stating that the company was established under a deed, which was set forth in the bill, for the purpose of running omnibuses between certain points; that their omnibuses were of a novel and superior construction; and that the defendant, with the view and design of fraudulently procuring the custom of persons who were in the habit of using the omnibuses of the plaintiffs, began to run between the same points an omnibus on which were painted the words "Conveyance Company" and "London Conveyance Company," in such characters and parts of the omnibus as exactly to resemble the same words on the omnibuses of the plaintiffs; that a star and garter were, in like manner, painted on the omnibus of the defendant, so as exactly to resemble the same symbol on the omnibuses of the plaintiffs; and that the green livery and gold hat bands, by which the plaintiffs distinguished the coachmen and conductors of their omnibuses, were in like manner imitated by the defendant. The bill further stated, that the plaintiffs served a notice upon the defendant, intimating that an injunction would be applied for if the defendant continued to use the title and insignia by which the omnibuses of the plaintiffs were distinguished; and that, after such notice, the defendant obliterated from the back of his omnibus the word "Company," and painted on each side of his omnibus, over the words "Conveyance Company," the word "Original," and between the words "Conveyance" and "Company" the word "for" in very small and invisible characters, so that there were then painted on the back of the defendant's omnibus the words "London Conveyance," and on each side the words "Original Conveyance for Company." The bill stated that the coachmen and conductors employed by the defendant continued to wear the same livery; and it charged that such colorable imitation of the name and title of the London Conveyance Company was a fraud upon the plaintiffs and the public; and it prayed an injunction. Lord Langdale, Master of the Rolls, after disposing of a preliminary question, held as

of a hotel is a trade mark which equity will protect by injunction.[1] But a word from a foreign language, signifying that the article is warranted, being unintelligible to purchasers, would seem not to come within the rule.[2]

§ 681. Reasonable diligence must be used in making the application for relief against piracy of a trade mark, and proceedings should be instituted immediately upon the discovery of the fraud.[3] But the person injured may relieve himself from the consequences of delay by showing that he had protested against the use of his mark.[4]

§ 682. With regard to the parties entitled to the relief, it is held that the owner and his agent can not join in the action, although the agent's name appears on the trade mark.[5] The relief resting upon the personal injury resulting from the use of complainant's mark, proceedings may be had against the offender wherever he resides, regardless of the *locus* of the offense. Hence an alien may bring the action, without averring that the goods of defendant have actually been sold within the jurisdiction where relief is sought.[6] Nor

follows: "The only other question is, whether the defendant fraudulently imitated the title and insignia used by the plaintiffs for the purpose of injuring them in their trade; and upon the affidavits and evidence before me, I have not the least doubt that the defendant did intend to induce the public to believe that the omnibus which he painted and appointed, so as to resemble the carriages of the plaintiffs, was, in fact, an omnibus belonging to the plaintiffs and the other proprietors of the London Conveyance Company. It is not to be said that the plaintiffs have any exclusive right to the words "Conveyance Company," or "London Conveyance Company," or any other words, but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendant's, belong to, and are under the management of the plaintiffs."

[1] Woodward *v.* Lazar, 21 Cal. 448.

[2] Gout *v.* Aleploglu, 6 Beav. 69, note.

[3] Chappell *v.* Sheard, 2 Kay. & J. 117; Chappell *v.* Davidson, Ib. 123.

[4] Motley *v.* Downman, 3 M. & C. 1; Harrison *v.* Taylor, 11 Jur. N. S. 408.

[5] Delondre *v.* Shaw, 2 Sim. 237.

[6] Taylor *v.* Carpenter, 11 Paige, 292; Collins Co. *v.* Brown, 3 Kay & J. 423; Collins Co. *v.* Cowen, Ib. 430.

will the relief be refused an alien because similar relief is withheld from aliens in the country to which complainant belongs.[1] Where the trade mark is the property of several tenants in common, the relief may be had by either of them individually.[2] And every one engaging in the sale of the spurious goods may be enjoined as a party to the fraud.[3]

§ 683. The property in a trade mark, being susceptible of assignment to anyone who takes at the same time the right to manufacture or sell the particular merchandise to which the trade mark pertains, the assignee may enjoin an infringement of the right.[4] And where the mark thus assigned designates truly the place where the goods are manufactured, and indicates with a reasonable degree of certainty their ownership, the fact that owing to changes in the firm, by death and otherwise, the name on the label is not the exact name of the manufacturers, does not constitute a sufficient objection to warrant a court of equity in withholding relief, in the absence of any attempt at deception.[5]

§ 684. The general principles upon which is founded the jurisdiction of equity over the piracy of trade marks, are likewise extended to literary publications, and an author or publisher acquires a right of property in the peculiar title of his work, or in the use of his name in connection therewith, for the violation of which he may properly apply to a court of equity for relief.[6] Thus, the publication of a magazine in the name of one who has ceased to authorize it will be enjoined.[7] A distinction, however, is taken between representing the work as original, though under the same title, and advertising it as that of another author.[8] And while the

[1] Coats v. Holbrook, 2 Sandf. Ch. 587.

[2] Dent v. Turpin, 2 J. & H. 139.

[3] Coats v. Holbrook, 2 Sandf. Ch. 587.

[4] Dixon etc. v. Grugenheim, 2 Phil. Legal Gazette, 105. And see Congress etc. Co. v. High Rock etc. Co., 45 N. Y. 291.

[5] Dixon etc. v. Grugenheim, 2 Phil. Legal Gazette, 105.

[6] Bell v. Locke, 8 Paige, 75; Hogg v. Kirby, 8 Ves. 215; Seely v. Fisher, 11 Sim. 582; Chappell v. Sheard, 2 Kay & J. 117.

[7] Hogg v. Kirby, 8 Ves. 215.

[8] Id.

relief will be granted to restrain defendant from using the name of complainant's newspaper, yet it must clearly appear that the name is used in such manner as to deceive and mislead the public, and to injure complainant in the good will of his own publication.[1]

§ 685. It is also to be remarked that an injunction is proper only in such cases as are clear, or at least free from all reasonable doubt. Thus, where defendant has sold his newspaper, with all the profits, rights and incidents pertaining to it, and afterward, and at the same place, begins another under a name somewhat similar, a doubt as to the identity of the two papers is sufficient ground for withholding the relief.[2] And the publication must have an actual existence before equity will interfere, and one who has advertised his intention of publishing a periodical under a certain name, does not thereby acquire such an exclusive right to that name, in advance of publication, as will entitle him to an injunction.[3] But where a song has been rendered popular by being sung by a particular person, its publication with a picture of the singer upon the title page, with a statement where and by whom it has been sung, gives the owner such rights of property therein as will authorize the interference of equity to restrain a similar publication in imitation thereof, even though the words of the song are changed.[4] Nor will it avail the defendant that he has warned his servants or employees to explain to purchasers that the songs are different.[5]

§ 686. The sale of one's interest in a copartnership carries with it the good will of the business, together with all advantages that may pertain to the firm name or place of business. Hence a retiring partner will not be allowed to renew the business under such a name as to imply that he is the successor to the old firm.[6] Upon the formation of a partnership, a

[1] Bell v. Locke, 8 Paige, 75.
[2] Snowden v. Noah, Hopk. Ch. 347.
[3] Maxwell v. Hogg, 2 L. R. Ch. Ap. 307.
[4] Chappell v. Sheard, 2 Kay & J. 117.
[5] Chappell v. Davidson, 2 Kay & J. 123.
[6] Churton v. Douglas, 5 Jur. N. S. 887.

trade mark belonging to one of the partners, in the absence of any agreement to the contrary, becomes partnership property,[1] and on the dissolution of the firm, in the absence of any stipulation or agreement, each of the partners has the right to use the mark.[2] The use, by new partners or their successors, of the old trade mark of a firm, is not considered a piracy, since it is merely equivalent to an announcement that the new partners are continuing the business formerly carried on by those whose name constituted the trade mark.[3]

§ 687. A corporate name is regarded as a trade mark, and as such it is entitled to the protection of a court of equity. And the right to the use of such name being matter of record, equity will not refuse to enjoin its improper use by a defendant corporation because the right has not been established at law.[4] Nor does the jurisdiction to restrain the piratical use of such name rest upon the insolvency of the defendant.[5] But the corporation whose name is improperly used must itself be a party to the suit, and the proceedings can not be brought by one of its bondholders, unless it has refused to proceed after being requested so to do.[6]

§ 688. The protection extended by courts of equity to trade marks, is not confined to artificial commodities, or to such as are the result of human ingenuity and skill. The essence of the injury consisting in the fraudulent sale by defendant of the goods or commodities of complainant as his own, the violation of right is the same, whether the commodity in question has been produced by the hand of nature or of man. And where the owner of a natural product, such as mineral water, has applied to it a particular name, under which name he has built up a large and profitable business in the sale of the article, he is entitled to an injunction to protect

[1] Bury v. Bedford, 33 L. J. Ch. 465.
[2] Banks v. Gibson, 34 Beav. 566.
[3] Leather etc. v. American etc., 11 H. L. 523.
[4] Newby v. Oregon etc. Co., Deady's Reports, 609.
[5] Id.
[6] Id.

him in the exclusive use of the name.[1] And complainants who have purchased the spring and the interest of the original owners, who invented and adopted the trade mark, are entitled to the same protection as the original owners themselves.[2]

§ 689. It is not every false statement with respect to articles sold which will constitute such a grievance as to warrant the interference of a court of equity, and a distinction is to be drawn between representations that the goods are the same as those of another, and statements that they are in fact the identical goods of another person, when in reality they are not. While, therefore, the person selling may represent his goods to be equal to or the same as those of another dealer, when they are inferior in quality, or different in kind, or that he is the inventor, when, in fact, he is a mere imitator, yet if he does not represent his goods as the actual manufacture of another, equity will not interfere, but will leave the parties to their remedy at law.[3] But the unauthorized publication of one's name in the prospectus of a company as one of its trustees, will be restrained.[4]

§ 690. The certificate of the registry of a trade mark issued by the commissioner of patents, in pursuance of the act of congress,[5] is not conclusive evidence that the device or symbol claimed as a trade mark is valid and legal as such, and this question is open for investigation by a court of equity, upon an application for an injunction.[6] And a package or barrel can not, by reason of its peculiar form, dimensions, or shape, constitute a trade mark, independent of any symbol, figure, or device impressed upon or connected with it.[7]

[1] Congress etc. Co. v. High Rock etc. Co., 45 N. Y. 291.

[2] Id.

[3] Seely v. Fisher, 11 Sim. 582; Leather etc. v. American etc., 11 H. L. 523; Clarke v. Freeman, 11 Beav 112.

[4] Routh v. Webster, 10 Beav. 563.

[5] Act of Congress of July 8, 1870, 16 Statutes at Large, 198.

[6] Moorman v. Hoge, 14 Int. Rev. Record, 155, decided in the United States Circuit Court for the District of California, October Term, 1871.

[7] Id. Sawyer, J., delivering the opinion of the court, says: "I have examined with care a large number of cases involving infringements of trade marks, including all the recent cases which I have been able to find,

§ 691. In applications for relief by injunction against the piracy of trade marks, the question to be considered is, not

so far as they bear upon the question in hand. It would be an arduous and unprofitable task to comment upon them all, and I shall content myself with stating briefly the result of my examination. In every case there was a trade mark proper, such as is indicated in this opinion, embracing some name, symbol, figure, letter, form or device, cut, stamped, cast, impressed or engraved upon, blown into, or in some manner attached to or connected with the article manufactured or sold, or the package containing it, or the covering or wrapping thereof. When the vessel containing the article was of glass, iron or other metal, whether of peculiar shape and dimensions or not, the trade mark proper was often blown, or cast, in the vessel, sometimes on a shoulder, sometimes into the body of the vessel. There are various ways of impressing upon or connecting with the vessel, package or article, the mark, but there always was a mark in fact, other than the shape or size of the vessel, or package. I find no case where the vessel, box, package, or whatever contained the article, has been held to constitute a trade mark by reason of its peculiar form or dimensions, independent of any symbol, figure or device impressed upon, or connected with it for a trade mark. I find no case where the use of a package of peculiar form and dimensions has been restrained without having imprinted upon or connected with it some other symbol, word, letter, or form, adopted as a trade mark. There are numerous cases where the use of a bottle, or other vessel, or package, having upon it the device adopted as a trade mark, has been enjoined, but I find none restraining the use of the bottle, vessel or package without the device impressed upon or connected with it. A manuscript copy of a recent decree rendered by the court of chancery at Louisville, Kentucky, in the case of Wilder *v.* Wilder, has been furnished me by complainant's counsel as a case in point. But in that case the defendants were restrained from selling 'any preparation or compound under the name and style of "J. B. Wilder & Co's Stomach Bitters," printed, stamped, or engraved upon the bottles, labels, wrappers, covers, boxes or packages thereof. Also from using the bottle herein exhibited marked "B 2," and from imitating or causing to be imitated in any manner, either the bottle or label of the plaintiff herein marked respectively "A and B."' This case does not appear to be in any respect inconsistent with the view indicated. Here was a trade mark proper in connection with the bottle, and as the court restrained defendants from selling the compound in connection with the trade mark, 'printed, stamped, or engraved upon the bottles,' doubtless the complainants' bottles referred to as exhibits in that case, had the trade mark impressed upon or blown into the bottles, and this being so, it would be impossible to use those bottles without their having the trade mark on them, and therefore also using the trade mark itself. The trade mark in such cases constitutes a part of that particular bottle. If this is not the true state of facts, then the copy of the decree furnished me does not show what the exact case is. At all events,

whether manufacturers or persons skilled in that particular business could distinguish between the two articles, but whether the general public would be likely to be deceived by

it does not appear to be an exception to the general rule before stated. There are numerous cases where the use of a particular bottle or package has been restrained, when the bottle or package had the trade mark impressed upon or blown into its structure, making it a part of the package itself, and it was necessary to include the particular description of bottle in order to restrain the use of the trade mark indelibly impressed upon it. But, as before stated, I find no instance where the use of a bottle, vessel, or package of a peculiar form and size has been enjoined with the trade mark of the complainant, or colorable imitation thereof used upon or connected with it omitted. Doubtless a bottle, vessel, or package of a peculiar form may be used as auxiliary to the trade mark proper, and may be of use in solving a question of intent of a party in imitating or using an evasive simulation of another's trade mark. As, for instance, a party may adopt a trade mark, and imprint it upon or connect it with the package of peculiar shape containing the articles of his manufacture. Another party might make a colorable simulation of the trade mark so used, but so different as to render it doubtful upon a mere inspection of the simulation of such mark alone, whether it was intended to be an imitation or not, or whether it would be likely to mislead the public. But if the imitator should, in addition to this, use the peculiar shaped package adopted by the party entitled to the trade mark, and impress upon or connect with it, the simulation of the trade mark, all doubt as to the intention and the effect would at once vanish. In this view a peculiar package might be a valuable auxiliary to the trade mark, although it could not, of itself alone, constitute a lawful trade mark, or a substantive part of a lawful trade mark. But its use would be in aiding to determine the character and effect of a colorable imitation of the trade mark proper, and the use of the imitation, or the simulated trade mark, or the use of the package with such simulation connected with it, would be the thing restrained. In this case there is no pretense that there is any imitation, or colorable simulation, of the marks and brands upon the package, or barrel. The use of the barrel with a simulation of the complainants' trade mark impressed upon it, would, doubtless, be restrained. But to extend the privilege of trade mark to the barrel in question alone, without having impressed upon, or, in any way connected with it, any of the other words, symbols or devices claimed and used by the complainants as a part of their trade mark, or any colorable imitation of it, would, in my judgment, be to go further than any case heretofore decided, and extend the privileges of trade marks to subjects not recognized by any established legal principles applicable to the subject. After careful examination of the question, my conclusion is, that the barrel in question, without any other marks, or symbols, is not, and that it can not become, a lawful trade mark, or a substantive or

the alleged imitation.[1] Nor will the court require evidence of actual deception before interfering, where it is of opinion that the use of the particular mark which it is sought to enjoin is likely to deceive.[2] And the relief may be granted, although the whole of the trade mark does not appear to have been pirated.[3] Nor is it requisite that the degree of resemblance should be such as to deceive persons on seeing the marks side by side, but it must be such that ordinary purchasers, proceeding with ordinary care, would be likely to be deceived.[4] And where the court is of opinion that the use of defendant's name or device on a literary publication is not such as to mislead persons of ordinary intelligence into purchasing defendant's publication for that of complainants, an injunction will be withheld.[5] Nor will the use of a particular label be restrained on the ground of its general resemblance to the trade mark of another manufacturer, where defendant's label differs in those points which a purchaser would be most likely to examine to ascertain whose article he was purchasing.[6]

§ 692. While one who has been in the actual employment of a firm of established reputation in a particular business, may, on beginning business of a similar character on his own account, inform the public that he has been in such employment, yet if he uses the name of the former firm in such manner as to mislead persons into the belief that he is carrying on the same business, or a branch of the business of the old firm, an injunction will be allowed.[7] Though in such case the court may, before granting the relief, require satisfactory

integral part of a lawful trade mark, and that complainants have no exclusive right to its use as such. The result is, that complainants' bill must be dismissed with costs, and it is so ordered."

[1] Shrimpton v. Laight, 18 Beav. 164.

[2] Braham v. Bustard, 11 W. R. 1061.

[3] Id.

[4] Seixo v. Provezende, L. R. 1 Ch. 192.

[5] Bradbury v. Beeton, 39 L. J. Ch. 57.

[6] Blackwell v. Crabb, 36 L. J. Ch. 504.

[7] Glenny v. Smith, 2 Dr. & Sm. 476; Williams v. Osborne, 13 L. T. N. S. 496. And see Croft v. Day, 7 Beav. 84.

proof, not only that defendant's use of the name is likely to mislead the public, but that complainant has warned him that it will have that effect.[1]

§ 693. We have already seen, in discussing the interference of equity to prevent the infringement of patents for inventions, that a patentee, whose rights have been infringed, is not bound to rely on the assurances or promises of the person infringing, that he will not repeat the wrong, and that such promises constitute no bar to relief by injunction.[2] The same doctrine prevails in cases of the piracy of trade marks, and the owner of a mark or device which has been illegally taken by another, is entitled to an injunction, notwithstanding defendant's promise to refrain from continuing the piracy.[3] But such false representations as amount to the slander of another's reputation and name, and as are calculated to bring them into contempt, do not afford sufficient foundation for the interference of equity, the proper remedy, if any, being by proceedings at law for a libel.[4]

§ 694. As in the case of infringement of patents or copyrights, one whose trade mark has been pirated is entitled to an account of the profits accruing to defendant by reason of his wrongful appropriation of the trade mark.[5] But where one has, in good faith, purchased articles bearing a spurious mark, for the purpose of again selling them in the course of trade, he will only be required to account for such profits as may have accrued after notice of the piracy.[6] And upon an inquiry as to the damages sustained by an unlawful appropriation of a trade mark, the burden lies upon complainant of establishing actual damage, by loss of custom or otherwise, and the court will not assume that complainant would have sold all the goods that defendant has sold marked with the

[1] Williams *v.* Osborne, 13 L. T. N. S. 498.

[2] See § 630, *ante.*

[3] Routh *v.* Webster, 10 Beav. 561; Welch *v.* Knott, 4 Kay & J. 747; Millington *v.* Fox, 3 Myl. & Cr. 338.

[4] Martin *v.* Wright, 6 Sim. 297; Seely *v.* Fisher, 11 Sim. 582; Clarke *v.* Freeman, 11 Beav. 112.

[5] Burgess *v.* Hills, 26 Beav. 244; Cartier *v.* Carlile, 31 Beav. 292.

[6] Moet *v.* Couston, 33 Beav. 578.

counterfeited device.[1] And though an injunction may be granted, even where the *scienter* is not proved, the court may withhold an account of profits, where the owner of the trade mark has been guilty of laches in seeking protection against the piracy.[2]

[1] Leather etc. Co. v. Hirschfield, 1 L. R. Eq. 299.
[2] Harrison v. Taylor, 11 Jur. N. S. 408.

CHAPTER XVII.

OF INJUNCTIONS PERTAINING TO CONTRACTS AND THEIR ENFORCEMENT.

I. NATURE AND GROUNDS OF THE JURISDICTION.
II. INJUNCTIONS AGAINST THE NEGOTIATION AND COLLECTION OF PROMISSORY NOTES.
III. INJUNCTIONS AGAINST THE BREACH OF NEGATIVE CONTRACTS.
IV. CONTRACTS IN RESTRAINT OF TRADE.

I. NATURE AND GROUNDS OF THE JURISDICTION.

§ 695. Foundation of the relief.
696. Requisites of the contract.
697. Remedy at law bars relief in equity.
698. Fraud a ground for relief against enforcement of contract.
699. Diversion of specific fund; process of manufacture.
700. Jurisdiction not limited to original contracting parties.
701. Conveyance in trust to a religious association.
702. Gaming contracts.
703. Usurious contracts.
704. Writ not granted where only part of debt is usurious.
705. Not granted where usury might have been pleaded at law.
706. Contracts pending litigation.
707. Complainant must come into court with clean hands.
708. Injunctions in aid of specific performance.

§ 695. While the remedy for past violations of contract is to be sought only in courts of law, the protection of contract rights and the enforcement of specific covenants, are matters which are properly cognizable in courts of equity. The jurisdiction by way of interlocutory injunction to restrain the violation of contracts, is based upon the necessity of protecting the legal right, and is exercised for the prevention of irrepara-

ble mischief. To warrant a court of equity in interfering, the contract itself must be free from doubt, and the injury apprehended from its violation must be of such a nature as not to be susceptible of adequate compensation in damages at law.[1] And a doubt as to the correctness of the construction of the contract on which the injunction is asked, is sufficient ground for refusing to interfere.[2] Nor will an injunction be allowed to restrain the violation of a contract tainted with champerty and maintenance.[3]

§ 696. It is to be observed that the contract concerning which the injunction is sought must be of such a nature as to be susceptible of enforcement by decree, and where the bill itself on which the injunction is sought fails to show such a contract, the injunction, which is intended in aid of the general relief sought, will not be allowed.[4] Nor is it sufficient that the legal right under the contract and its violation are clearly made out, since, if the agreement is of such a nature that a court of equity can not enforce specific performance of its terms, or if the injury is one for which ample redress can be had at law, equity will not interfere.[5] And if the contract is uncertain and vague in its provisions, or is of an unjust and oppressive character, the relief will be withheld.[6]

§ 697. The fact that ample remedy exists at law for the violation of an agreement, is always a sufficient objection to the interference of equity. Thus, where a railway has been constructed under a contract whose terms provide for its construction in a particular manner, for the protection of the owners of real estate over which the road passes, the remedy for violation of the agreement is not by enjoining the use of the road until the terms of the contract are complied with,

[1] Morris etc. v. Society etc., 1 Halst. Ch. 203.

[2] Id.

[3] Gregerson v. Imlay, 4 Blatch. 503.

[4] Canton etc. v. Northern etc., 21 Md. 383.

[5] Collins v. Plumb, 16 Ves. 454; Mann v. Stephens, 15 Sim. 379; Munro v. Wivenho etc., 11 Jur. N. S. 613.

[6] Mann v. Stephens, 15 Sim. 379; Kimberley v. Jennings, 6 Sim. 340; Talbot v. Ford, 13 Sim. 173.

but by an action at law for pecuniary damages, and in such a case equity will not interfere.[1]

§ 698. Fraudulent representations and oppressive conduct in obtaining an agreement or contract, frequently afford ground for relief in equity to prevent its enforcement at law against the contracting party on whom the fraud was exercised. Thus, a perpetual injunction has been granted against proceedings at law to recover an annuity upon a contract entered into on the strength of mistaken and false representations as to the value of certain property.[2] And an injunction to prevent the sale of mortgaged premises has been made perpetual upon proof that through the influence of the mortgagee the mortgagor had, by habitual drunkenness, become reduced to a condition of imbecility bordering on insanity, the mortgagee being unable to show any valid consideration for the contract.[3]

§ 699. An injunction may be granted to prevent an improper diversion of a specific fund, out of which, by agreement between the parties upon sufficient consideration, payment is to be made for certain stock subscribed.[4] And one who discovers or invents a process of manufacture which he does not disclose to the public, has such a property therein, regardless of whether the process is patentable, as will be protected in equity by enjoining one who, in violation of his contract and in breach of confidence, undertakes to apply the process to his own use or that of third persons.[5]

§ 700. The jurisdiction of equity for the protection and enforcement of contract rights is not limited to the original parties to the agreement, but may be exercised in favor of their assignees, and may be invoked on their behalf in aid

[1] Pusey v. Wright, 31 Pa. St. 387.

[2] Dale v. Roosevelt, 5 Johns. Ch. 174.

[3] Van Horn v. Keenan, 28 Ill. 445.

[4] Ashe v. Johnson's Adm'r., 2 Jones Eq. 149.

[5] Peabody v. Norfolk, 98 Mass. 452. Complainant in this case had built a mill and furnished it with machinery invented by himself for manufacturing cloth by a secret process. An engineer in his employ, who had contracted not to give information concerning the machinery, but to preserve the process a secret, was enjoined from violating his contract.

of proceedings at law. And where one has parted with his equitable interest in a contract not assignable at law, he may be restrained from interfering with or preventing the use of his name by the assignee in enforcing the contract by action at law, or from attempting to dismiss the action.[1]

§ 701. Where real estate is conveyed to the trustees of a religious association to be used as a place of worship, in accordance with the doctrines and forms of a particular church, the contract may be protected in equity by restraining its violation. And if ministers of a different faith, and who are not recognized by the church prescribed as the standard, are permitted to officiate in the church, there is such a departure from the trust created by the original contract as to warrant a court of equity in interfering.[2] And persons who have contributed to a fund raised by subscription, on condition that an educational institution should be permanently located at a specified place, are entitled to the aid of equity to restrain its removal from such place. The jurisdiction in such case is exercised upon the ground that the acceptance of the conditions constitutes a contract, the attempted violation of which may be enjoined.[3]

§ 702. In the case of a contract void for want of sufficient consideration, as a note or bond given for money lost at gaming, the defense being one of a purely legal nature, equity will not interfere to restrain the enforcement of judgment, where no defense was interposed to the action at law and no excuse is offered for having failed to defend.[4] If, however, defendant is prevented by surprise from asserting his defense to an action upon a gaming contract, he will not be debarred from relief in equity, even though he made no effort to obtain a new trial in the action at law.[5] If it is doubtful whether the contract on which a judgment has been obtained was given for

[1] Deaver v. Eller, 7 Ired. Eq. 24.

[2] Attorney General v. Welsh, 4 Hare, 572. For further illustrations of the same principle, see Chapter V, *ante*.

[3] Hascall v. Madison University, 8 Barb. 174.

[4] Giddens v. Lea, 3 Humph. 133; Jones v. Jones, N. C. Term R. 110.

[5] White v. Washington's Ex'r., 5 Grat. 645.

a gaming consideration, and is therefore void, and if there is also doubt as to whether the judgment creditor to whom the debt was transferred took it under the belief that the consideration was lawful, a preliminary injunction granted against the judgment may be retained until the facts can be determined.[1] But it has been held, under a statute prohibiting gaming, that a judgment founded upon a gaming contract may be enjoined, although the contract has been assigned to an innocent holder, ignorant of its origin, and although no defense was interposed at law.[2]

§ 703. Proceedings at law for the enforcement of usurious contracts will, as a general rule, be enjoined only upon condition that the party aggrieved make actual payment or tender of the amount really due.[3] But if defendant answers without availing himself of this objection, an injunction already granted will not be dissolved, where complainant offers to pay the amount actually due.[4] But where an injunction is allowed to prevent a sale of land under a trust deed, until the question of usury can be determined, and a verdict at law determines that the contract was usurious, the injunction should not be perpetuated for the entire amount, but only for that portion which is usurious.[5]

§ 704. While an injunction may properly be allowed against the sale of real estate under a deed of trust to secure a contract alleged to be usurious, until the question of usury can be determined, or until the lender can establish the validity of his contract at law, on the ground that the proceedings being *in pais*, the borrower is without his day in court, yet if the usurious contract embraces likewise a pre-existing, valid debt, unaffected by the usurious debt, or by being

[1] Nelson's Adm'r. v. Armstrong, 5 Grat. 354.

[2] Woodson v. Barrett, 2 Hen. & M. 80. And see Skipwith v. Strother, 3 Rand. 214.

[3] Morgan v. Schermerhorn, 1 Paige, 544; Miller v. Ford, Saxt. 358: Rogers v. Rathbun, 1 Johns. Ch. 367; Tupper v. Powell, Ib. 439; Fanning v. Dunham, 5 Johns. Ch. 122; Turpin v. Povall, 8 Leigh, 93.

[4] Morgan v. Schermerhorn, 1 Paige, 544.

[5] Bell v. Calhoun, 8 Grat. 22.

coupled therewith, a different rule applies, and proceedings to enforce the debt secured by the deed of trust will not be restrained for the purpose of compelling the obligee in the bond to establish his claim at law.[1] And it is to be observed that in those cases where preliminary injunctions are granted to restrain the enforcement of deeds of trust, on the ground that the contract to secure which they were given was usurious, the relief is continued only until the question of usury can be determined. If, therefore, the validity of the contract is fully established, the injunction will be dissolved, otherwise it may be made perpetual.[2]

§ 705. While, as we have just seen, equity may under some circumstances interfere to prevent the enforcement of contracts tainted with usury, yet if the cause has been submitted to a legal forum and there decided, a court of equity will not afford relief against the judgment, in the absence of any special circumstances of fraud, or complicated and embarrassing facts connected with the transactions alleged to be usurious. In all such cases it is a sufficient objection to the exercise of the jurisdiction that the usury, if any, might have been urged as a defense to the action at law, and defendant having neglected to avail himself of the opportunity of defending in the legal forum, is debarred from relief in equity.[3] If, however, the remedy at law is surrounded with embarrassment and difficulty, the transaction involving a large number of usurious securities, and being exceedingly complex in its nature in consequence of the devices resorted to for the purpose of concealing the usury, a court of equity may properly extend its aid by injunction.[4]

§ 706. Although equity has undoubted jurisdiction to restrain parties from entering into such contracts, pending

[1] Marks v. Morris, 2 Munf. 407; Bank of Washington v. Arthur, 8 Grat. 173.

[2] Marks v. Morris, 2 Munf. 407; Martin v. Lindsay's Adm'rs., 1 Leigh, 499; Fitzhugh v. Gordon, 2 Leigh, 626.

[3] Lindsley v. James, 3 Cald. 477; Morgan v. England, Wright, Ohio, 112; Lansing v. Eddy, 1 Johns. Ch. 49; Buchanan v. Nolin, 3 Humph. 68; McKoin v. Cooley, Ib. 559.

[4] Frierson v. Moody, 3 Humph. 561.

litigation, as may embarrass plaintiff in his action at law, yet this jurisdiction is to be exercised in the sound discretion of the court, after weighing the relative convenience and inconvenience likely to result to the parties. And where it is apparent that the injury which would result to the plaintiff by refusing the injunction, as compared with that which defendant would sustain by its being granted, is extremely small, the relief will be withheld.[1]

§ 707. He who seeks the aid of equity to enjoin the violation of an agreement, or for the protection of his contract rights, must himself come into court with clean hands, and to entitle himself to relief he must have carried out as far as possible his own part of the contract.[2] So, too, he must show that he has used reasonable diligence in asserting his rights and in demanding their protection, and unreasonable delay in seeking the aid of a court of equity, or acquiescence in the violation of the agreement in question, will generally prove a bar to the exercise of the jurisdiction.[3]

§ 708. To warrant a court of equity in granting an injunction in aid of the specific performance of a contract, it will

[1] Shrewsbury etc. v. Shrewsbury etc., 1 Sim. N. S. 410. The following observations of the Vice Chancellor in this case clearly present the grounds on which relief is refused: * * "Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between *interim* interference and *non interim* interference, the balance greatly preponderates in favor of the defendant and against the plaintiff. Now, here, the injury to the plaintiffs, in comparison with the injury to the defendants, is extremely small. * * And, on the whole, if the convenience and the inconvenience are weighed against each other, the inconvenience seems to me to preponderate, beyond all measure, in favor of the party who has the legal right to enter into any legal contract he pleases. That is the short ground on which I feel myself bound to refuse the injunction."

[2] Stiff v. Cassell, 2 Jur. N. S. 348; Fechter v. Montgomery, 33 Beav. 22.

[3] Powell v. Allarton, 4 L. J. Ch. N. S. 91; Maythorne v. Palmer, 11 Jur. N. S. 230; Roper v. Williams, 1 Turn. & R. 18.

usually suffice if complainant establishes a *prima facie* case entitling him to specific performance, and it is not necessary that it should conclusively appear that he will maintain his case upon the final hearing.[1] It is to be observed, however, that an injunction in aid of specific performance, being merely ancillary to the main purpose of the bill, is dependent upon that and must stand or fall with the bill. And where it appears that the contract which it is sought to enforce specifically is not concluded or certain in all its parts, so as to be properly enforced, the injunction will be dissolved for want of equity in the bill.[2] So, too, if there are disputes concerning the rights of the parties under the contract, such disputes involving the very terms and obligation of the contract itself, an injunction will be withheld until the rights of the parties are ascertained and adjusted.[3] And if upon the case as made out by the bill, complainant is not entitled to a specific performance, he can not have an injunction, which is merely ancillary to the principal object of the suit.[4]

II. Injunctions against the Negotiation and Collection of Promissory Notes.

§ 709. Fraud or duress a ground for relief.
710. Violations of trust; parties.
711. Effect of injunction restraining payment of note.
712. Fraud; undue influence; threats.

§ 709. The aid of equity is sometimes invoked to restrain the collection of commercial paper, where its enforcement would be inequitable and against conscience. And it may be asserted as a rule, that where promissory notes have been obtained by fraud or duress, or by undue influence and without adequate

[1] Powell *v.* Lloyd, 1 Y. & J. 427; Attwood *v.* Barham, 2 Russ. 186; Crosbie *v.* Tooke, 1 Myl. & K. 433.
[2] McKibbin *v.* Brown, 1 McCart. 18.
[3] Brown's Appeal, 62 Pa. St. 17.
[4] Allen *v.* Burke, 2 Md. Ch. 534.

consideration, an injunction may be properly granted to restrain their collection, if in the hands of the payee.[1] Thus, where complainant has been induced to give his notes and a mortgage upon threats of a prosecution for perjury, which threats were utterly groundless, the collection of the securities will be restrained.[2] So undue influence exercised upon the maker of a note, who was a person of weak mind and constantly given to intoxication, has been deemed sufficient ground for enjoining a suit upon the note.[3] So, too, fraudulent representations in the sale of a patent right, or the failure of the patent, which constituted the original consideration for which the notes were given, has been held sufficient to warrant an injunction against their collection.[4]

§ 710. Where one has received commercial paper which has been entrusted to him for a special use or purpose, and in breach of the trust reposed in him, he attempts to convert the paper to a different use, he may be enjoined from any act, such as carrying on a suit at law, which may be the means or instrument of the violation of trust.[5] And the assignees of such note, taking it under circumstances sufficient to apprise them of the fraud or breach of trust, may be enjoined from proceedings at law for its enforcement.[6] But if a note has passed into the hands of a *bona fide* holder for valuable consideration, proceedings at law for its collection will not be restrained on the ground of fraudulent representations by the payee to the maker.[7] Nor will the fact that a payment was made upon the note while in the hands of the payee, who assigned it without indorsing the payment, warrant an injunction to restrain proceedings under a judgment recovered by the assignee of the note.[8]

[1] Sacket *v.* Hillhouse, 5 Day, 551; Darst *v.* Brockway, 11 Ohio, 462. James *v.* Roberts, 18 Ohio, 548; Rembert *v.* Brown, 17 Ala. 667.

[2] James *v.* Roberts, 18 Ohio, 548.

[3] Rembert *v.* Brown, 17 Ala. 667.

[4] Sacket *v.* Hillhouse, 5 Day, 551; Darst *v.* Brockway, 11 Ohio, 462.

[5] Atlantic etc. *v.* Tredick, 5 R. I. 171.

[6] Id.

[7] Dougherty *v.* Scudder, 2 C. E. Green, 248.

[8] Cummins *v.* Bentley, 5 Ark. 9.

§ 711. With regard to the effect of a temporary injunction restraining the payment of a note, as where the makers and guarantor have been enjoined from making payment, it is held that the writ constitutes no bar to the recovery of a judgment upon the note itself.[1] But in no event should parties be enjoined from the payment of notes who are not made defendants in the bill, and an injunction granted against such persons will be dissolved because of the non-joinder.[2]

§ 712. The negotiation of commercial paper may be enjoined where it was obtained through fraudulent or improper conduct, rendering it against conscience to enforce it, and where there is danger of its passing into the hands of innocent purchasers for valuable consideration and without notice, whereby the maker would be cut off from asserting his defense at law.[3] And undue influence used in obtaining a note will warrant the court in enjoining its collection. Thus, in the case of a young woman who had just attained her majority, and who was induced through the representations of her relatives, with whom she lived and by whom she was largely controlled, to give a promissory note, without consideration and in ignorance of its terms, an injunction was allowed against the enforcement of judgment upon the note.[4] So where notes have been inequitably and unjustly extorted from complainant

[1] Campbell v. Gilman, 26 Ill. 120.

[2] Fellows v. Fellows, 4 Johns. Ch. 25.

[3] Hood v. Aston, 1 Russ. 412; Sharp v. Arbuthnot, 13 Jur. 219; Green v. Pledger, 8 Hare, 165; Thurman v. Burt, 58 Ill. 129.

[4] Espey v. Lake, 10 Hare, 260. "I take it to be quite clear," says the Vice Chancellor, "that the principles of this court go to this extent—that, in the case of a security taken from a person just of age, living under the influence and in the house of another person, with a relationship subsisting between such other person and the person from whom the security is taken, which constitutes anything in the nature of a trust, or anything approaching to the relation of guardian and ward, or of standing in *loco parentis* to the surety, this court will not allow such security to be enforced against the person from whom it is taken, unless the court shall be perfectly satisfied that the security was given freely and voluntarily, and without any influence having been exercised by the party in whose favor the security is made, or by the party who was the medium or instrument of obtaining it."

by force of judicial process, issued contrary to an express agreement, and such notes are without consideration in fact or in law, the payee may be enjoined from putting them in circulation by assignment or otherwise.[1]

III. Injunctions against the Breach of Negative Contracts.

§ 713. The remedy analogous to specific performance.
714. Covenants in lease enforced by injunction.
715. Covenant not to carry on a certain business enforced.
716. Illustrations of the rule; sub-lessees may be enjoined.
717. Relative convenience not regarded where the right and its violation are clear.
718. Otherwise if these are in doubt.
719. Breach of covenant need not amount to nuisance.
720. Certainty; damages; threatened breach.
721. When covenant may be controlled by recitals.
722. Construction of contract as to penalty and liquidated damages.
723. The same.
724. Present in distinction from reversionary rights.
725. Covenant need not run with the land.
726. Lessor's conduct may debar him from relief.
727. Negative covenants in conveyances of realty.
728. Subsequent purchasers may be enjoined.
729. Covenants for mutual benefit of purchasers.
730. Laches a bar to relief.
731. Injunction not allowed where contract can not be enforced.
732. General rule applicable to contracts for personal service.
733. Contracts containing both affirmative and negative stipulations.
734. Distinction.
735. Purely negative contract.

§ 713. The remedy by injunction to prevent the violation of negative agreements, or contracts not to do a particular thing, is closely akin to the remedy by way of specific performance of agreements of an affirmative nature. In both cases the object sought is substantially one and the same, and by enjoining the violation of a negative contract a court of

[1] Thurman v. Burt, 53 Ill. 129.

equity in effect decrees its specific performance.[1] Thus, in the case of an author who has contracted to write for a publisher and covenanted that he will not write for any other during the continuance of his agreement, an injunction will be allowed to restrain another publisher from employing him, thus in effect enforcing the performance of the contract.[2] So an author who has sold a work with an express stipulation that he will do nothing to interfere with its publication, may be enjoined from publishing another work upon the same subject, whose publication would hinder and impede the sale of the first.[3]

§ 714. Courts of equity are frequently called upon to prevent by injunction the violation of negative covenants annexed to leases, and thus indirectly to enforce specific performance of the contract for the benefit of the lessor. Thus, where premises are leased under an express covenant on the part of the tenant that he will not convert meadow land, an injunction will be allowed to prevent him from breaking up meadow land for the purpose of building, the relief being granted expressly because of violation of covenant, and not upon the ground of waste.[4] And where a lessee is by the terms of his lease restricted to a particular use of the demised premises, equity will restrain him from any other use of them, even though no irreparable injury be shown to result from such breach of covenant. The interference in such case is based upon the ground that, while there is a remedy at law for breach of the covenant on the part of the lessee, a new suit would have to be brought daily for each daily repetition of the offense, and an injunction is therefore necessary to prevent a multiplicity of suits, as well as on the ground of the great difficulty in estimating damages at law for such a grievance.[5]

[1] Lumley v. Wagner, 1 De Gex, M. & G. 615; Stiff v. Cassell, 2 Jur. N. S. 348.

[2] Stiff v. Cassell, 2 Jur. N. S. 348.

[3] Barfield v. Nicholson, 2 Sim. & St. 1.

[4] De Wilton v. Saxon, 6 Ves. 106.

[5] Steward v. Winters, 4 Sandf. Ch. 587. This was a bill by a lessor to restrain his lessee from using the premises demised as an auction store,

§ 715. Where premises are leased under an express covenant not to carry on a business that will interfere with

the lease containing a covenant that the store should be "occupied by the regular dry goods jobbing business, and for no other kind of business." A motion to dissolve the injunction was denied, Sandford, Vice Chancellor, observing as follows: * * * "It is said that the remedy at law for damages is adequate, and that, so far from there being an irreparable injury by the continuance of the breach of this covenant, it is shown that there can be no injury at all. I apprehend that we are not to regard this subject in the manner indicated by the latter proposition. The owner of land, selling or leasing it, may insist upon just such covenants as he pleases touching the use and mode of enjoyment of the land; and he is not to be defeated when the covenant is broken, by the opinion of any number of persons, that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition. In the case of the bakery in 1 Vesey & Beames, hereafter cited, I have no doubt a great many witnesses might have been found who would have testified that the bakery was not an annoyance to them, or to any but over-sensitive persons. And in Hills *v.* Miller, 3 Paige, 254, the injury to the complainant, if tested by the opinions of witnesses, would scarcely have resulted in even nominal damages, in an action at law. It is not necessary that the act complained of should amount to a nuisance in law, either public or private. Nor is the court to enter into a comparison, and permit a tenant to carry on some trades as less offensive than others, where the covenant prohibits the former. (Per Lord Eldon, in Macher *v.* The Foundling Hospital, 1 Ves. & B. 188.) So far as the injury is concerned, it is therefore unnecessary for the complainant to establish that it will be irreparable; or on a continuing covenant, that it will be substantially injurious. The question remains is there an adequate remedy at law? In the first place, it is manifest that at law a new cause of action will arise every day that the defendants sell at auction. If the lessor avail himself of his full rights at law, he will sue daily for damages. This would lead to a multiplicity of suits, harrassing to both parties, and highly obnoxious to the censure of a court of equity. Then if the suits were brought, how is it possible to estimate the actual damages? A jury might enter into a wide field of conjecture, without any certainty of coming out of it at the point of justice to the parties. The jurors might infer that the continuance of an auction business in the demised premises would for years diminish the rent of the adjoining property, and render the premises less desirable to good tenants. But any estimate of damages on that basis, however well founded, would be wholly conjectural. A different jury might imagine that the conducting of an auction business would enhance the value of the adjoining premises, and refuse to give any damages. And witnesses could undoubtedly be produced whose opinions would sanction a finding in either of these modes. I think that in a case were the parties, by an

that of lessors upon their adjoining premises, upon pain of a forfeiture of the lease and payment of a penalty, defendants may be restrained from violating the covenant by carrying on the business, the relief being regarded as analogous to that by specific performance, and the jurisdiction being exercised upon the ground that the breach of the agreement would be a constantly recurring grievance.[1] But if defendants have been allowed to continue their acts for a long period of years, without objection, complainants are estopped from relief in equity, and must seek a remedy at law.[2] It is held, however, that in such case no pretense of title acquired by long con-

express stipulation, have themselves determined that a particular trade or business conducted by the one will be injurious or offensive to the other, and there is a continuing breach of the stipulation by the one, which this court can perceive may be highly detrimental to the other, although on the facts presented it is not clear that there is a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages, it is the duty of the court, by injunction, to restrain further infractions of the covenant, thereby preventing a multiplicity of petty suits at law, and at the same time protecting the rights of the complainant."

[1] Barret *v.* Blagrave, 5 Ves. 555.

[2] Same *v.* Same, 6 Ves. 104. In the latter case the right to the injunction was based upon the claim by complainants that the business carried on by defendants came within the terms of the covenant. It appeared, however, that it had been carried on without interruption for more than ten years. Eldon, Lord Chancellor, said: "May not a very different question be made; whether if you have permitted this to go on for eleven years, you must not take your chance at law? I have not the least doubt that what is stated in the affidavits is within the terms of the covenant; but the question is, whether you can have a specific performance under such circumstances, the parties having from the execution of the lease, eleven years ago, permitted that covenant to stand an ineffective part of the lease. I rather doubt whether, so far from the court's interfering at your instance, a bill might not be filed to prevent your suing at law upon that covenant. If there are equitable circumstances to prevent your taking your legal remedy, surely they will prevent your having a specific performance." And the injunction was accordingly dissolved. But see, *contra*, Society etc. *v.* Low, 2 C. E. Green, 19, where it is held that the covenant is a continuing covenant, running with the land, and its violation being of constant recurrence, the lessor's right to relief is not forfeited by long delay in making his application.

tinued enjoyment on the part of the lessee can avail him, if such enjoyment be adverse to the covenants of his lease.[1]

§ 716. Upon similar principles the lessee of a mine, who has covenanted by the terms of his lease not to remove certain machinery from the mine, may be enjoined from violating his agreement.[2] And where the lessee has agreed not to carry on any trade or business upon the premises leased, an injunction will be allowed to prevent him from using the premises for school purposes.[3] Nor is the jurisdiction confined merely to restraining the original tenant from breach of covenant, but it may properly be exercised against a sub-lessee who has covenanted not to carry on a particular trade on the premises demised, even though such covenant appears only in the assignment of the lease and not in the original instrument.[4] And a covenant in a lease that a house shall be used only for the purposes of a dwelling house, is held to be a covenant running with the land, and though the assignees of the lease are not mentioned in the covenant, an injunction will be granted to prevent a breach by an assignee of the lease and his sub-tenant.[5]

§ 717. In the exercise of its jurisdiction by injunction to restrain the violation of contracts, equity looks only to the terms of the contract itself, and is not governed by considerations of the relative convenience and inconvenience to the parties likely to result from granting or withholding the relief. And if the contract right is clearly established and the violation is apparent, the agreement being of such a nature as to be capable of specific enforcement, an injunction may be granted regardless of the inconvenience to defendants.[6] Nor will it avail against the granting of the writ that the act complained of will be productive of no injury to the com

[1] Society etc. *v.* Low, 2 C. E. Green, 19.
[2] Hamilton *v.* Dunsford, 6 Irish Ch. 412.
[3] Kemp *v.* Sober, 1 Sim. N. S. 520.
[4] Clements *v.* Welles, 1 L. R. Eq. 200.
[5] Wilkinson *v.* Rogers, 12 W. R. 284.
[6] Tipping *v.* Eckersley, 2 Kay & J. 264; Johnstone *v.* Hall, Ib. 439; Storer *v.* Great Western etc., 2 Y. & C. C. C. 48.

plainant, and may even be beneficial to him, since it is for him to say whether the agreement shall be preserved, or whether he shall permit it to be violated. And the fact of the violation of the contract being established, the court may interfere without requiring proof of actual damage.[1] Nor will it avail defendant that the work undertaken in violation of the agreement is one of great public importance, or that great inconvenience is likely to result to the public in case he is compelled to perform his agreement.[2]

§ 718. The rule as laid down in the preceding section, is to be accepted with the qualification that considerations of the relative convenience and inconvenience to the parties are rejected only when the covenants themselves are clear and free from doubt, and their violation is clearly established, and where irreparable injury is likely to result unless the breach is restrained. But if these conditions do not co-exist the question to be determined is one of comparative injury, and the court will be governed by considerations of the relative inconvenience likely to result to the parties from granting or refusing the relief.[3] And upon an application for an interlocutory injunction to restrain a breach of covenant, if the question is involved in doubt, the burden rests upon the party complaining to show that the balance of convenience is in favor of granting the injunction.[4] But the relief will not be withheld merely because the agreement contains other covenants which are likely to be broken in the future.[5]

§ 719. To warrant the interference of equity against breaches of covenants limiting the use of demised premises, it is not requisite that the act complained of should amount to a nuisance in law, either public or private.[6] And permit-

[1] Dickenson *v.* Grand Junction etc., 15 Beav. 270. And see Ingram *v.* Morecraft, 33 Beav. 49. And see Steward *v.* Winters, 4 Sandf. Ch. 587.

[2] Lloyd *v.* London etc., 2 DeGex, J. & S. 568; Raphael *v.* Thames etc., 2 L. R. Ch. Ap. 147; Foster *v.* Birmingham etc., 2 W. R. 378.

[3] Wilkinson *v.* Rogers, 12 W. R. 284.

[4] Child *v.* Douglas, 5 DeGex, M. & G. 739.

[5] Rigby *v.* Great Western etc., 15 L. J. Ch. 271.

[6] Steward *v.* Winters, 4 Sandf. Ch. 587. And see Macher *v.* Foundling Hospital, *infra*.

ting one trade to be carried on without objection will not raise an inference that the lessee may afterwards carry on another, nor will the court in such case enter into a comparison as to which of several trades is more offensive than others.[1] And where a lessee covenants against using the premises as a shop or warehouse for any trade, without a written license, or permitting anything which might grow to the damage and inconvenience of lessors, or any of their other tenants, a court of equity will not grant an injunction against entering judgment and issuing execution in ejectment for breaches of the covenants.[2]

§ 720. Certainty is an essential element in the contract whose enforcement is sought by injunction, and where a covenant is indefinite and uncertain in its provisions, no injunction will be allowed.[3] So, too, it is usually requisite that the party aggrieved should show some appreciable damage as the result of the breach of covenant which he seeks to restrain. And a grantee with covenants of quiet enjoyment, will not be allowed an injunction to prevent his grantor from raising the level of a stream running through the premises of the grantor and past those of the grantee, where no damages result from the act which are susceptible of appreciation, and there being no covenant against doing that particular act.[4] It is not, however, requisite that the breach of covenant against which preventive relief is sought in equity should have been actually committed at the time of making the application, and it is a sufficient ground of interference that defendant insists upon his right to do the act in question.[5] But equity will not assume that defendant intends to violate his covenant and will not interpose unless it is manifest that a breach is intended.[6]

§ 721. While a covenant in an instrument may, if ambiguous, be controlled by the recitals in the same instrument,[7]

[1] Macher v. Foundling Hospital, 1 Ves. & B. 188.
[2] Id.
[3] Low v. Innes, 10 Jur. N. S. 1037.
[4] Ingram v. Morecraft, 33 Beav. 49.
[5] Tipping v. Eckersley, 2 Kay & J. 264.
[6] Foster v. Birmingham etc., 2 W. R. 378.
[7] Selby v Crystal Palace etc., 30 Beav. 606.

yet if it contains an absolute covenant not to do a particular act, such covenant will not, in the absence of any proceedings to rectify the agreement, be controlled by a recital from which it appears that the parties intended that the act might be done upon payment of a fixed sum by way of liquidated damages, and an interlocutory injunction will issue to restrain the breach of the covenant.[1] But the fact that a right of re-entry is reserved to a lessor in the event of a breach of covenant, does not preclude him from obtaining relief in equity against the commission of the breach, since he is not bound to adopt the remedy of re-entry provided in the lease, but may seek relief in an equitable forum.[2]

§ 722. In all cases where a fixed sum of money is mentioned in the instrument as payable upon a breach of covenant, the question for determination is whether the sum named was intended as a penalty to secure the faithful performance of the covenants, or whether it was designed as an equivalent to be paid for the privilege of doing the act forbidden. And where the covenant is absolute in its terms, and the specified sum has been inserted as a penalty to insure the faithful performance of the obligations thereby imposed, the payment of the penalty will not deprive equity of its jurisdiction to restrain the commission of the forbidden act.[3] Upon the other hand, if it is manifest that the parties intended that the particular act might be done upon payment of the sum specified, the power to do the act upon payment of the money enters into and forms a part of the contract, and equity will neither interfere to prevent the doing of the act, nor to grant relief from the payment of the money agreed upon as an equivalent.[4] As illustrating this distinction, it is held that where a lessee of lands covenants not to burn over any portion of the premises demised, under the penalty of a

[1] Bird *v.* Lake, 1 Hem. & M. 111.

[2] Parker *v.* Whyte, 32 L. J. Ch. 520.

[3] Bird *v.* Lake, 1 Hem. & M. 111; Hardy *v.* Martin, 1 Cox, 26; Howard *v.* Hopkyns, 2 Atk. 371; Fox *v.* Scard, 33 Beav. 327; Sloman *v.* Walter, 1 Bro. C. C. 418; French *v.* Macale, 2 Dr. & War. 269.

[4] Ranger *v.* Great Western etc., 5 H. L. 94; Street *v.* Rigby, 6 Ves. 818; Sainter *v.* Ferguson, 1 Mac. & G. 289; Coles *v.* Sims, 5 DeGex, M. & G. 1.

certain fixed sum per acre, to be recovered as additional rent for every acre burned, he is not entitled to burn over the ground upon payment of the amount specified as liquidated damages, and the penalty does not deprive a court of equity of its jurisdiction to restrain the act.[1] But where the lessee covenants not to plow up pasture lands, or, if he does, that he will pay a certain sum for every acre plowed, an injunction will not be granted to restrain him from plowing, the relief being refused upon the ground that the parties have themselves fixed the damages and agreed upon the price to be paid for doing the act.[2]

§ 723. It is to be observed, however, that the use of the terms "penalty" and "unliquidated damages" in the instrument, is not necessarily conclusive as to the interpretation which shall be put upon it, and the sum so reserved may be held to be liquidated damages, although called a penalty in the covenant, and *vice versa*.[3] But where the covenant is in its nature a continuing one, and the sum specified as payable upon the breach is to be recovered in the reserved rent, it is regarded in equity as a penalty and not as liquidated damages.[4] Especially will the sum be construed in the nature of a penalty where, in addition to the increased rent, it is also provided that the doing of the act forbidden shall work a forfeiture of the interest of the covenantor.[5] But the fact that the sum specified in the lease as payable upon the breach of the covenants, may be largely in excess of the real damage, will not of itself render the sum so reserved a penalty, since it will be construed as an increased rent fixed by the parties to be paid during the remainder of the term.[6]

§ 724. The question of whether relief by injunction shall be granted against a breach of covenant, is sometimes deter-

[1] French *v.* Macale, 2 Dr. & War. 269.

[2] Woodward *v.* Gyles, 2 Vern. 119; Rolfe *v.* Patterson, 2 Bro. P. C. 436.

[3] Gerrard *v.* O'Reilly, 3 Dr. & War. 414; Bird *v.* Lake, 1 Hem. & M. 111; Coles *v.* Sims, 5 DeGex, M. & G. 1.

[4] French *v.* Macale, 2 Dr. & War. 269.

[5] French *v.* Macale, 2 Dr. & War. 269.

[6] Woodward *v.* Gyles, 2 Vern. 119.

mined by the relation which the party aggrieved sustains to the premises, as whether he is actually in possession, with a right to the present enjoyment of the property, or whether his interest is that of a remainder-man or reversioner. And while the party seeking specific performance of a covenant, if actually in possession, is entitled to the protection of equity in the enjoyment of the property according to his covenant, yet if he be entitled only in remainder or reversion, some special damage by reason of the breach must be shown before a court of equity will interfere.[1] Thus, where premises are demised upon condition that they shall be used only for dwelling purposes, and that no trade or business of any nature shall be carried on upon the premises, the remainder-man, who files a bill for relief against a breach of the covenant, the tenant for life refusing to interfere, will not be allowed an injunction where he fails to show some special and material damage as the result of the infraction.[2] Though if the lessee were carrying on a grossly noxious or offensive trade, it would seem that relief might be allowed the remainder-man.[3]

§ 725. One who has covenanted not to lease any house for hotel purposes, and not to lease any land within certain limits for the erection of a hotel, may be restrained from selling any land for such purpose, and from doing any act tending to the breach of his covenant.[4] Nor is it necessary that the covenant whose enforcement is sought should run with the land so as to be binding in law upon purchasers, since equity may restrain purchasers with notice of the covenant from doing any act in violation of its terms. Thus, where one conveys a garden in fee, the grantee covenanting for himself and assigns that no buildings shall be erected upon the garden, a purchaser from the grantee with notice of such covenant will be restrained from violating it, regardless of whether he is bound by its terms at law.[5] And where land vested in trustees is sold in

[1] Johnstone v. Hall, 2 Kay & J. 414.
[2] Id.
[3] Id.
[4] Jay v. Richardson, 30 Beav. 563.
[5] Tulk v. Moxhay, 11 Beav. 571, 2 Ph. 774. "The question," observes Lord Cottenham, "is not whether the covenant runs with the land, but

building lots, the conveyances containing certain restrictive covenants, it is held that each purchaser has an equity against the others to compel the faithful observance of the conditions.[1]

§ 726. The lessor may by his own conduct deprive himself of the right to equitable interference for the prevention of a breach of covenants contained in the lease. For example, where all the leases of an estate contain covenants that the tenants will build only in accordance with a prescribed plan, for the purpose of securing uniformity, the landlord having permitted some of his tenants to build upon their premises in violation of these covenants, will not be allowed to restrain other tenants from building in the same manner, though they may have had no license or permission so to do.[2] More especially will the relief be refused where the landlord has been negligent in the assertion of his rights.[3] And where a contract between lessor and lessee is in its nature so harsh and oppressive upon the lessee that equity ought not to give it effect, an injunction to prevent its violation will be refused.[4]

§ 727. The aid of equity is frequently invoked to prevent the breach of covenants contained in conveyances of real estate. And it may be asserted as a general rule, that covenants prohibiting the purchaser from the erection of dwellings, or restricting him in the size or manner of erections, or the purposes for which the premises will be used, will be enforced in equity by restraining the purchaser, or his assigns with notice, from their violation.[5] Thus, where one sells a lot adjoining his own premises, with a provision in the deed restricting the purchaser as to the size of the erections to be placed upon the premises, such a condition is regarded as for the benefit of the

whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."

[1] Eastwood *v.* Lever, 33 L. J. Ch. 357.

[2] Roper *v.* Williams, 1 Tur. & Russ. 18.

[3] Id.

[4] Talbot *v.* Ford, 13 Sim. 173.

[5] Seymour *v.* McDonald, 4 Sandf. Ch. 502; Clark *v.* Martin, 49 Pa. St. 289; Hills *v.* Miller, 3 Paige, 254; Trustees etc. *v.* Cowen, 4 Paige, 510; Mann *v.* Stephens, 15 Sim. 377.

vendor, and subsequent purchasers of the property may be enjoined from violating the covenant.[1] But, while equity may properly restrain parties from erecting buildings higher than they are authorized to do by their act of incorporation, or by the terms of a contract, a small excess in height above that authorized will not constitute ground for an interlocutory injunction to prevent the use of the building after it has been erected, no irreparable injury being shown from such excess.[2]

§ 728. The right to relief in cases of this nature is not limited to the original purchaser upon whom the conditions are imposed, but extends to his assigns who purchase with knowledge of the original covenants. And where real estate is sold with covenants that no building shall be erected thereon, and it passes through the hands of successive purchasers, the final owner in fee, with notice of such covenants, may be restrained from violating them by the erection of buildings.[3] So, too, the jurisdiction may be exercised to prevent the breach of negative covenants on the part of the vendor of real estate. Thus, where the vendor has covenanted in the conveyance not to erect or to permit the erection of any buildings on his premises in front of those conveyed, the erection of buildings in violation of the terms of the agreement will be enjoined.[4]

§ 729. Where adjoining lots in the same block are from time to time sold to different purchasers, the conveyances of the lots containing mutual covenants between the grantor and the respective grantees against the erection of any noxious or offensive structure on the premises, and against carrying on any trade or business whatsoever which might be in anywise offensive to the neighboring inhabitants, the covenants in the deeds are regarded in equity as for the mutual benefit and protection of all the purchasers. And although a prior purchaser in such case might have no right of action at law upon a covenant in a deed to a subsequent purchaser, he is entitled

[1] Clark *v.* Martin, 49 Pa. St. 289.

[2] Warden etc. *v.* South Eastern etc., 9 Hare, 489.

[3] Mann *v.* Stephens, 15 Sim. 377. And see Seymour *v.* McDonald, 4 Sandf. Ch. 502.

[4] Hills *v.* Miller, 3 Paige, 254; Trustees etc. *v.* Cowen, 4 Paige, 510.

to the aid of equity by injunction to restrain the carrying on of any noxious or offensive business, such as a coal yard, upon the lot of such subsequent purchaser. And upon demurrer to the bill, its allegations as to the noxious effects of the coal dust upon adjoining residents, though highly wrought and expressed in ornate and poetical language, will not be regarded as a fiction, and the demurrer will be overruled.[1]

§ 730. If, however, complainant has stood idly by and permitted the erection complained of to be made and expenses to be incurred therein, without objecting, his application for the aid of a court of equity comes too late and will not be entertained. Thus, where purchasers of real estate have bought upon condition that they are to use the land for a specific purpose and none other, they will not be restrained

[1] Barrow *v.* Richard, 8 Paige, 351. "There can be no doubt," observes Walworth, Chancellor, "if the allegations in the bill are true, that the use of lots No. 12 and 13 as a coal yard is a clear violation of the covenants of the grantees of those lots. The language of the covenant shows that several other uses of the lots, far less offensive than this, are in terms prohibited on the ground that they would probably be offensive to the neighborhood. The allegation in the bill on this subject, though it is a little poetical, can not be considered a mere poetic fiction, as it is sworn to by the complainant and is admitted by the demurrer. He there states that large quantities of volatile and offensive dust and smut from the coal, rise in the air, and are diffused by the wind, into the premises of the neighboring inhabitants. And in spite of all their care, such coal dust and smut not only settles upon their walks and their grassplats, but also on their fragrant plants and flowers, 'beclouding the brightness and beauty which a beneficent Creator has given to make them pleasant to the eye, and cheering to the heart of man.' But what must be still more offensive to the ladies of the neighborhood, 'this filthy coal dust settles upon their door steps, thresholds, and windows, and enters into their dwellings, and into their carpets, their cups, their kneading troughs, their beds, their bosoms, and their lungs; discoloring their linen and their otherwise stainless raiment and robes of beauty and comfort, defacing their furniture, and blackening, besmearing and injuring every object of utility, of beauty, and of taste.' Making all due allowance for the *coloring* which the pleader has given to this naturally *dark* picture, it is perfectly certain that this keeping of a coal yard upon any of these lots is a business offensive to the neighboring inhabitants, according to the spirit and intent of these restrictive covenants. The vice chancellor was therefore right in overruling the demurrer. And the order appealed from is affirmed with costs."

from using it for other purposes where complainant has permitted them to go on without objection and to incur large expense in the work proposed, no sufficient excuse being shown for the delay in invoking the aid of equity.[1]

§ 731. Where an agreement is of such a nature that it is practically impossible for a court to enforce it, and the bill for an injunction is in effect a bill for specific performance, equity will not interfere. Thus, where the lessee of an inn has covenanted to keep it open as an inn during the period of his lease, and not to do any act whereby the license might become forfeited, an injunction will not be allowed to restrain him from discontinuing to use and keep open the premises as an inn, since this would in effect be a mandatory injunction directing him to carry on the business of an inn keeper.[2] And in such case, it not appearing that the lessee threatens or intends any act whereby the license might become forfeited, an interlocutory injunction, granted upon filing the bill, should be dissolved.[3] So where defendant had contracted to take notes of cases heard and determined in court and to publish them in the form of law reports for complainant, but had failed to comply with his agreement, an injunction was refused to prevent him from making reports for persons other than the complainant.[4] And where complainant had entered into an agreement with a railway company to conduct its road and to keep the rolling stock in repair, the court refused to enjoin the company from employing any other person than complainant to do the work contracted, upon the ground that it was impossible from the nature of the agreement to enforce it specifically by compelling defendant to employ complainant.[5]

§ 732. The rule as here laid down applies generally to contracts for personal service, where from the nature of the case it is impossible to compel the contracting party to render the services. Thus, in the case of contracts for theatrical and

[1] Water Lot Company *v.* Bucks, 5 Geo. 315.
[2] Hooper *v.* Brodrick, 11 Sim. 47.
[3] Id.
[4] Clarke *v.* Price, 2 Wilson Ch. C. 157.
[5] Johnson *v.* Shrewsbury etc., 3 De Gex, M. & G. 914.

operatic performances, a court of equity, having no power to compel the performance of the acts required, will not usually interfere by injunction.[1] And where complainant had agreed to sing in concerts and operas, and not to make other engagements during the period of the contract, an injunction was refused to prevent the contractor from making other engagements.[2] In all such cases the proper remedy is by proceedings at law for the violation of the contract.[3] Pending an action at law by a theatrical manager for damages resulting from the violation of a contract to play at plaintiff's theater for a given length of time, defendants will not be enjoined from playing elsewhere, nor will another manager be enjoined from contracting for their services.[4] Even were such a case a fit one for the exercise of the jurisdiction of equity, plaintiff having elected to proceed in a legal forum should abide by his decision. Nor will a manager be allowed an injunction to prevent an actor from playing at another theater, when by the terms of his contract he is not restricted from so doing.[5]

§ 733. The authorities are somewhat conflicting as to whether, in cases of contracts containing both affirmative and negative stipulations, a court of equity may lend its aid by injunction to prevent a breach of the negative stipulation when the affirmative is of such a nature that it can not be specifically enforced by a judicial decree. While it has been contended, with much show of reason, that the negative part of the agreement might be enforced by injunction, though the affirmative part could not be specifically enforced by decree, as where defendant has contracted to sing at complainant's

[1] Sanquirico *v.* Benedetti, 1 Barb. 315; Burton *v.* Marshall, 4 Gill, 487. And see Kemble *v.* Kean, 6 Sim. 333.

[2] Sanquirico *v.* Benedetti, 1 Barb. 315.

[3] Id.

[4] Burton *v.* Marshall, 4 Gill, 487.

[5] Caldwell *v.* Cline, 8 Mart. N. S. 684. But see Webster *v.* Dillon, 3 Jur. N. S. 432, where an actor had contracted to play at a particular theater, without contracting that he would not play elsewhere, and an injunction was allowed to prevent him from acting at any other than plaintiff's theater on the nights when he had contracted to play there.

theater and not at any other,[1] yet the clear weight of authority seems to support a contrary doctrine, and to deny relief in equity against a violation of the negative stipulation when the court is unable to enforce the affirmative one.[2] Thus, where an actor has agreed and covenanted with the proprietors of a theater that he will act for them during a certain period, and will not act elsewhere, since a court of equity can not enforce the positive part of the contract, it will not interfere by injunction to restrain a breach of the negative part.[3]

[1] Lumley *v.* Wagner, 1 De Gex, M. & G. 604. Lord St. Leonards, Chancellor, after reviewing the authorities, says: "The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendant, * * but of an act to be done by the defendant alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant, the one being ancillary to, concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theater, and during that time not to sing for anybody else, is not a correlative contract; it is in effect one contract. * * The engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater."

[2] Sanquirico *v.* Benedetti, 1 Barb. 315; Hills *v.* Croll, 2 Ph. 60; Kemble *v.* Kean, 6 Sim. 333; Kimberley *v.* Jennings, Ib. 340.

[3] Kemble *v.* Kean, 6 Sim. 333. Chadwell, Vice Chancellor, after stating that the bill was in effect to procure a specific performance of the contract requiring defendant to act at complainant's theater, observes as follows: "In the first place, independently of the difficulty of compelling a man to act, there is no time stated; and it is not stated in what characters he shall act; and the thing is, altogether, so loose that it is perfectly impossible for the court to determine upon what scheme of things Mr. Kean shall perform his agreement. There can be no prospective declaration or direction of the court as to the performance of the agreement; and, supposing Mr. Kean should resist, how is such an agreement to be performed by the court? Sequestration is out of the question; and can it be said that a man can be compelled to perform an agreement to act at a theater by this court sending him to the Fleet for refusing to act at all? There is no method of arriving at that which is the substance of the contract between the parties, by means of any process which this court is enabled to issue; and therefore (unless there is some positive authority to the contrary) my opinion is that, where the agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance of it in this court, and it is only guarded by a negative provision, this court will leave the parties, altogether, to a court of law, and will not give partial relief by enforcing only a negative stipulation."

§ 734. A distinction, however, has been taken between cases where, as in those just considered, the injunction is merely ancillary to the principal relief sought, which is a specific performance of the affirmative portion of the contract, and where the real and only object of the bill is to prevent a breach of the negative stipulation. Thus, where it is contracted with complainant that one of two persons shall not carry on the business of a tailor within a certain locality, the remaining portion of the contract being that the other of the two persons shall be employed by complainant in his business so long as it shall be carried on, upon a bill seeking only to restrain the breach of the negative stipulation, an injunction may be allowed.[1] In such case the negative agreement is entirely distinct and separable from the affirmative, there being in effect two distinct contracts, and relief is sought only against a violation of the negative stipulation.

§ 735. Where the contract, to restrain the violation of which an injunction is sought, is purely a negative contract, unconnected with any affirmative stipulations, relief may be properly granted, especially where the agreement is between partners, and is for the benefit of the partnership business. Thus, where one of several partners in a theater, covenants with the other partners that he will not write plays for any other theater, but does not agree to write for the theater belonging to the firm, he may be enjoined from violating such agreement.[2] And it is held that the jurisdiction to restrain the breach of a negative agreement, or a promise to abstain from doing a particular thing, is not limited to cases where the court has jurisdiction over the acts of complainant.[3] Nor is it material whether the right sought to be protected is at law, or under an agreement which can not otherwise be brought within the jurisdiction of equity, provided the bill states a right in the person complaining to the performance of the negative agreement of the defendant.[4]

[1] Rolfe v. Rolfe, 15 Sim. 88.
[2] Morris v. Colman, 18 Ves. 437.
[3] Dietrichsen v. Cabburn, 2 Ph. 52.
[4] Id.

IV. Contracts in Restraint of Trade.

§ 736. General rule.
737. Grounds of the jurisdiction.
738. Covenants against practicing as an attorney.
739. Court will not imply covenant.
740. Special cases.
741. Governing principle.
742. Relief granted where contract is not satisfied by payment of liquidated damages.
743. Injunction withheld in cases of doubt.
744. Covenant against publications; jurisdiction not confined to original parties.
745. Legal and equitable relief not granted at the same time.

736. Courts of equity are frequently called upon to aid in the enforcement of contracts restricting one in the exercise of his trade or profession within a specified locality, or a given period of time. While covenants in restraint of trade generally are absolutely void, both at law and in equity, because contrary to public policy, yet where the restraint is only partial, being limited as to the conditions of time or space, and reasonable ground exists for such restriction and it is founded upon good consideration, the contract will generally be enforced in equity by restraining its violation.[1]

§ 737. The jurisdiction in cases of this nature is based upon the ground that the parties can not be placed *in statu quo*, and that damages at law can afford no adequate compensation, the injury being a continuous one and irreparable by the ordinary process of courts of law. In conformity with these principles it has been held that contracts between physicians, whereby one is restricted from the exercise of his profession within a prescribed area, upon sufficient consideration, as for example a sale of the good will of the business, will be

[1] Butler *v.* Burleson, 16 Vt. 176; McClurg's Appeal, 58 Pa. St. 51; Whittaker *v.* Howe, 3 Beav. 383; Morris *v.* Colman, 18 Ves. 437; Rolfe *v.* Rolfe, 15 Sim. 88; Nicholls *v.* Stretton, 7 Beav. 42.

enforced by enjoining any attempt at the exercise of the profession within the locality specified.[1]

§ 738. Upon similar principles, where an attorney and solicitor, on selling his business to a new firm, covenants for a valuable consideration not to practice within a period of twenty years in any part of the country, and not to induce any of the clients of the old firm to withhold their business from the new, he will be enjoined from violating the agreement.[2] And where defendant, on being articled as a clerk to complainant, who was an attorney at law, covenanted that he would not interfere with complainant's clients, or act for them in the capacity of attorney, he was restrained from a breach of his covenant.[3]

[1] McClurg's Appeal, 58 Pa. St. 51; Butler v. Burleson, 16 Vt. 176. In the latter case, the following observations of the court very clearly illustrate the grounds upon which the interference is based: "When there is an express covenant, and an uncontroverted mischief arising from the breach of it, equity will grant an injunction to restrain the breach. In this case there is an express contract. The mischief arising from the breach of it can not be repaired, nor can it well be estimated. A suit at law would afford no adequate remedy, and the damages will be continuing and accruing from day to day, and furthermore the object of the contract can only be obtained by the parties conforming expressly and exactly to its terms." Injunction sustained.

[2] Whittaker v. Howe, 3 Beav. 383.

[3] Nicholls v. Stretton, 7 Beav. 42. This was a case where defendant, on being articled as a clerk to complainant, an attorney, covenanted that he would not in any way interfere with or be concerned as attorney, or otherwise, for any of complainant's clients or correspondents, upon pain of forfeiting the sum of one hundred pounds for every breach of the covenant. The defendant, having acted as attorney for certain parties who had been clients of complainant, a bill was filed praying a perpetual injunction against such intermeddling in violation of the terms of the agreement. Lord Langdale, Master of the Rolls, though conceding that the enforcement of the terms of a negative contract might possibly work injury to third parties in such a case, sustained the jurisdiction as follows: "In all cases of this kind, where an injunction is asked to restrain a party from exercising his professional employment, the court has always had some reluctance in acting, for not only is it, to some extent, a restriction on trade, but it may also have the effect of depriving third parties of the services of those in whom alone they may have confidence. The question has arisen not only in the case of solicitors, but in that of medical men. There was a case before Lord Eldon, of a medical man who had covenanted

§ 739. To warrant a court of equity in interfering by an injunction in such cases, there must be an actual contract, and the court will not imply a covenant on the part of one who sells the good will of a trade or business not to carry on the same trade in that locality. It follows, therefore, that where one has sold the good will of his trade, without any express covenant preventing him from resuming the trade in that vicinity, he will not be enjoined from so resuming it.[1] It is not necessary, however, that the contract should be in writing to entitle it to the protection of equity; and where one has sold the lease of a house with the good will of the business connected therewith, and has agreed orally that he will not renew the business in that street, he may be enjoined from violating such oral agreement.[2]

§ 740. Where one sells his premises, together with the fixtures and good will of his business, and as part of the consideration for the purchase of the good will, he covenants not to carry on the business at a specified place, the purchaser agreeing to employ him, he may be enjoined from setting up business in violation of his covenant, even though he has been discharged from the purchaser's employ, and the evidence does not clearly show that he was properly dismissed.[3] So where a

not to be employed for certain persons, and those persons being taken ill, it was a case of great hardship to say that he should not attend them. It must be admitted that this court can not interfere in these cases without the possibility of injury to third parties. That difficulty, however, has been passed over, and the court has repeatedly exercised its jurisdiction in cases of this nature. It is no answer to say, in this case, that the client would not have employed the plaintiff in the particular case referred to. Any interference with his clients was one of the very things which the plaintiff, when he took the defendant into his office, was desirous of guarding against. I do not see any ground on which I can say that this is a contract which this court will not enforce. The perseverance of Stretton in acting in this manner and in availing himself of the introduction he accidentally acquired in the plaintiff's office, has made this application necessary. I must grant this injunction; the only question is, as to the terms in which it should be expressed."

[1] Cruttwell v. Lye, 17 Ves. 335.

[2] Harrison v. Gardner, 2 Madd. 198.

[3] Daggett v. Ryman, 17 L. T. N. S. 486.

tailor, upon the sale of his business, good will and fixtures, covenants not to carry on or be interested or concerned in the same business within an area of five miles from the former location, he will be enjoined from working as a journeyman upon a salary, in the employ of a nephew of the same name and conducting the same business, within a quarter of a mile of the old location.[1]

§ 741. The governing principle in this class of cases seems to be, that, although contracts in restraint of trade are bad on grounds of public policy, unless they are natural and reasonable for the protection of the parties dealing with the subject matter of the contract, and although public policy requires that the citizen should not deprive himself or the state of his skill or talent, yet one who has a commodity to sell should be permitted to sell it most advantageously in the market, by precluding himself from entering into any competition with the purchaser. Thus, where the owner of letters patent for the manufacture of a valuable article of commerce, sells his patents to a company incorporated for carrying on the manufacture of the article, and covenants not to carry on or allow to be carried on in any part of Europe any manufacture or sale of productions similar to those which were the subject of the patents, and not to communicate to any one the processes of the manufacture in such manner as to interfere with the exclusive enjoyment of the benefits purchased, the covenant is one capable of being enforced in equity, and its breach will be prevented by injunction.[2]

[1] Newling *v.* Dobell, 19 L. T. N. S. 408.

[2] Leather Cloth Company *v.* Lorsont, 39 L. J. N. S. Eq. 86. The principles underlying the jurisdiction of equity for the protection of contracts in restraint of trade, are clearly stated in this case by James, Vice Chancellor, as follows: * * * * "The truth is that all the cases, when they come to be examined, according to my view of it, establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties dealing legally with some subject matter of contract, and that the principle is this: public policy requires that every man should be at liberty to work for himself, and should not be at liberty to deprive himself or the state of his labor, skill or talent by any contract that he enters into. On the other hand, public policy requires this: that where a man

§ 742. Where the court is of opinion that the conditions of a bond, in restraint of trade in a particular locality, were not

has by skill or any other means obtained something which he wants to sell he should be able to sell it in the most advantageous way in the market, and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser, that then the same public policy which enables him to do that, does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the court is not unreasonable, having regard to the subject matter of the contract. Now in this case the subject matter of the contract was a particular manufacture carried on partly under patents and partly by processes which were known to the vendors, and it is to be assumed not known except to the vendors themselves and their agents and workmen. That being the subject matter of the contract, the stipulation is that the vendor will not set up a similar manufacture in Europe, and will not communicate the process of the manufacture anywhere so as to interfere with the exclusive enjoyment by the intended company of the benefits thereby agreed to be purchased. It seems to me that the case much more resembles, having regard to these facts, the sale of a secret (which has been held to be perfectly good), and as connected with the sale of that secret an unlimited stipulation as to time or place as to communicating the secret or dealing with it so as to interfere with the purchaser, because in truth there were particular processes for the manufacture, those processes were to be communicated, and they were to be communicated for the exclusive benefit of the purchaser. It is settled by authority that a man may bind himself not to communicate that process to anybody else, that he should not communicate that secret anywhere under any circumstances in any part of the world to anybody. But how would it be possible to enforce such a covenant as that not to communicate the process, if he were at the same time to be at liberty to carry on that same trade with the same processes in such a way that they would have to be communicated to every servant and workman engaged by him in the trade? Therefore, the mere fact that he is entitled to restrain himself simply amounts to this: it is not that he is restrained, but that he is entitled to restrain himself, from communicating, and is thereby enabled to get a higher price for that which he is selling. The fact that he is so entitled to restrain himself from communicating the process entitles him also to restrain himself from carrying on a manufacture which would involve the communication of the process. Therefore, independently of those words, 'so as in any way to interfere with the exclusive enjoyment,' I am of opinion that there is nothing in this covenant which violates the rules of law or which is in contravention of the decided cases, when the principles upon which these cases have been decided come to be properly considered. But if there were anything in the covenant so standing which might be supposed to be in contraven-

intended to be satisfied by the payment of the sum named in the bond as liquidated damages, it may properly interfere to restrain a violation of the terms of the instrument. Thus, where the bond contains a recital that defendant, who has become the managing clerk for complainant, a solicitor, should enter into a bond not to practice as a solicitor within fifty

tion of some of the decided cases, I am satisfied myself that those words, 'so as in any way to interfere with the exclusive enjoyment of the Company,' do properly and sufficiently modify and qualify it; the principle being that you are not to have any more restraint than is necessary for the benefit of the company, and in order to obviate any objection you must not do it so as to interfere; that is for the company to say; we do not ask for any unreasonable restraint, for any capricious restraint upon you, we only ask you to tie yourself up not to do something which will interfere with that which you profess to sell to us, and for which you have received a consideration. Therefore, I am of opinion that the plaintiffs are right in saying that the covenant is one capable of being enforced in this court. Then the next question is, has the defendant, Lorsont, been doing anything which is in violation of that covenant? I am of opinion that he is doing so, that he is engaged in a manufactory for the manufacture of productions similar to those which were the subject of letters patent, and which were then manufactured in the manufactory so carried on at West Ham at the time of the contract, that is to say it was proved to me that the particular production is the production of an article known as Crockett's leather cloth, that Crockett's leather cloth was manufactured at West Ham at that time, that Crockett's leather cloth, called by that very name, is manufactured by the defendant and sold by him under that very name, with an advertisement from him to the effect that the goods supplied by him are in every respect similar to those made by the Crockett International Leather Cloth Company while the works were 'under my management,' and then he states his sixteen years experience and so on. That is to say, having covenanted that he would not be engaged in the manufacture of products similar to those which were then being made, he circulates to the world a letter saying: 'I am now actually making productions which are in every respect similar to those which were made by the vendors and afterwards made by the purchaser.' I am of opinion, therefore, that the plaintiffs are entitled to an injunction. The injunction, I think, ought to be in these words, the only evidence given before me being with regard to Crockett's leather cloth, 'To restrain the defendant from carrying on any manufactory for the production of Crockett's leather cloth, or being engaged in any company for the sale of Crockett's leather cloth, or any production similar thereto,' and from in any manner holding himself out as the manufacturer of such Crockett's leather cloth, or any production similar thereto.' That is the whole extent to which I purpose granting the injunction."

miles of the same place, and that on violation of his agreement he should pay a fixed sum as liquidated damages, the solicitor will be allowed an injunction to restrain the clerk from practicing within the distance specified, in violation of his covenant.[1]

§ 743. A merchant who, upon selling his stock in trade and business, covenants not to carry on the same business at the same place, or within certain limits surrounding, and who thereupon gives up his place of business, will not be enjoined from afterward soliciting and procuring orders within the specified territory, the question of whether this constitutes a breach of the covenant being regarded as too doubtful to warrant an injunction without bringing an action.[2] And where one undertakes the management of the business of a chemist, covenanting against carrying on the same business in his own name and for his own benefit, or in the name and for the benefit of any other person, within a certain radius, under a specified penalty secured by bond, and he afterward solicits orders for another chemist within the limits specified, the effect of such conduct upon the covenant in question is regarded as too doubtful to warrant a preliminary injunction.[3] So where one sells his business, agreeing not to carry it on in the same place, either in his own name or in the name of other persons, for a period of five years, and during this period he acts as manager for another person engaged in the same business and in the same place, the question is regarded as too doubtful to be dealt with on an application for an interlocutory injunction.[4] And a covenant against engaging in a certain trade, or in any matter pertaining thereto, within a certain district, is

[1] Howard v. Woodward, 10 Jur. N. S. 112.

[2] Turner v. Evans, 2 DeGex, M. & G. 740.

[3] Clark v. Watkins, 9 Jur. N. S. 142.

[4] Allen v. Taylor, 18 W. R. 888. And see same case upon final hearing, 23 L. T. N. S. 651. But where one agrees that he will not directly or indirectly, either alone or in partnership with, or with the assistance of any other person, set up or follow or practice a particular business, he is regarded as violating his covenant by conducting the business in the capacity of assistant or manager to another person. Dales v. Weaber, 18 W. R. 993.

not regarded as violated by loaning money to one engaged in such business, the loan being secured by mortgage upon the business premises, even though the covenantor may know that the mortgagor's only means of repaying the money is out of the profits of the business.[1]

§ 744. A covenant on the part of a publisher that he will not publish in future a particular magazine, is considered in the same light as a covenant by one selling a particular trade or business, that he will not again engage in that trade or business, and is not void as a general contract in restraint of trade. But the injunction, in such case, will be confined to restricting the publication of the particular magazine specified.[2] And it is to be observed that the jurisdiction in restraint of breaches of negative contracts is not confined to the contracting parties, but may be extended to third parties, with notice of the covenant. Thus, where an author assigns the copyright of a work published in his name, covenanting not to publish any work prejudicial to the sale of the first, a publisher who, with notice of such covenant, afterward publishes a work from the same author, in the same name, and upon the same subject, will be enjoined, though the latter work may not be an actual piracy, and though it is published under a different title.[3]

§ 745. One who is aggrieved by the violation of a contract not to do a certain act under a certain penalty, will not be allowed both legal and equitable relief at the same time. And where a motion for an injunction to restrain the breach of such an agreement is ordered to stand over, with leave to complainant to proceed at law, and he recovers liquidated damages in the action at law, he will not be allowed an injunction to restrain the further breach of the agreement.[4] Upon similar principles, where an action at law is instituted to recover a penalty as liquidated damages for the violation of a covenant made by a surgeon not to resume practice within a

[1] Bird *v.* Lake, 1 Hem. & M. 338.
[2] Ainsworth *v.* Bentley, 14 W. R. 630.
[3] Barfield *v.* Nicholson, 2 L. J. Ch. 90.
[4] Sainter *v.* Ferguson, 1 Mac. & G. 286.

certain district, an injunction will not at the same time be granted to prevent him from practicing in such district.[1] And if, after obtaining an injunction against the breach of an agreement, the party aggrieved brings an action at law for damages, the injunction may be dissolved on the application of defendant.[2]

[1] Carnes v. Nesbitt, 7 H. & N. 158; Mayall v. Higby, 1 H. & C. 148
[2] Fox v. Scard, 33 Beav. 327.

CHAPTER XVIII.

OF THE PARTIES FOR AND AGAINST WHOM THE JURISDICTION IS EXERCISED.

I. Of Parties in General.
II. General Corporations.
III. Municipal Corporations.
IV. Public Officers.
V. Partners.
VI. Executors and Administrators.
VII. Sureties.
VIII. Husband and Wife.

I. Of Parties in General.

§ 746. General rule as to joinder of parties.
747. Writ not usually granted against party not before the court; when granted in name of the people.
748. Rule as to parties not before the court.
749. Parties to actions at law.
750. Officers of court not usually made defendants to bill for injunction against judgment.
751. Plaintiffs in judgment must be joined as defendants in injunction bill.
752. Jurisdiction of United States courts.
753. Test applied in cases of easements of a public nature.
754. Dedication of land to public use.
755. Corporate authorities proper parties to enjoin public nuisance.
756. Test as to parties complainant.
757. Judgment against school district.
758. Injunctions against garnishees.
759. Churches and religious bodies.
760. Principal and agent.

§ 746. The general principles deducible from the authorities as to the joinder of parties complainant and defendant, in

proceedings in courts of chancery, apply to the case of injunction bills, and by these principles the court is guided in determining whether proper parties have been brought before it, for or against whom relief by injunction is asked. It may be premised, generally, that the jurisdiction will be exercised only in behalf of parties interested in the transaction or subject matter of the proceedings which it is sought to enjoin, and that one who has no personal interest in the matter is not entitled to the relief, even though he may have been a party to the proceedings at law which he seeks to restrain.[1] Nor will equity interpose by injunction for the protection of one who seeks relief indirectly through the equities of other parties, on which they themselves do not insist.[2]

§ 747. As a general rule, an injunction will not be allowed against a party not a defendant to the bill, or not properly brought before the court.[3] If, however, the court is in full possession of a cause, it may, simply upon motion in the action, restrain parties from proceeding at law with respect to the same matter.[4] And a purchaser under a decree in equity may be enjoined from acting contrary to the decree, though not a party to the proceedings.[5] Where the act which it is sought to enjoin is one which affects the interests of the public at large, proceedings for an injunction are usually brought, both in England and in the United States, in the name of the people, or of the attorney general at the instance of a relator.[6] And in actions to enjoin the erection or continuance of public nuisances, this course is always pursued.[7]

[1] Wynne v. Newborough, 1 Ves. Jr. 164; Hunter v. Nockolds, 15 L. J. Ch. 320.

[2] Roberts v. Bozon, 3 L. J. Ch. 113.

[3] Fellows v. Fellows, 4 Johns. Ch. 25; Schalk v. Schmidt, 1 McCart, 268; Iveson v. Harris, 7 Ves. 256; State of Kansas v. Anderson, 5 Kan. 90.

[4] Harrison v. Gurney, 2 Jac. & W. 563; Wedderburn v. Wedderburn, 2 Beav. 208.

[5] Casamajor v. Strode, 1 Sim. & St. 381.

[6] Soltau v. DeHeld, 2 Sim. N. S. 150; Attorney General v. Compton, 1 Y. & C. C. C. 417; Attorney General v. Lea's Heirs, 3 Ired. Eq. 302; Same v. Perkins, 2 Dev. Eq. 38.

[7] People v. Vanderbilt, 28 N. Y. 396; Same v. Same, 38 Barb. 282; Attorney General v. Richards, 2 Anst. 602.

§ 748. Where the effect of an injunction would be to cause material injury to the rights of persons not before the court, the relief will rarely be granted unless in cases of very great necessity.[1] But upon an application for an injunction the court may proceed against such defendants as have been served with process, although others are not yet served.[2] And the fact that parties for whose benefit an injunction will operate are not before the court, though good ground of demurrer to the bill, is no bar to granting the relief, where the property to be protected is in actual danger unless the injunction be allowed.[3] And if the act complained of affects a common right of several persons whose interests are, in a legal point of view, substantially the same, proceedings for an injunction may be instituted by one or more of them in behalf of the others.[4] But the action will not lie against different persons for separate infringements or violations of one and the same right.[5]

§ 749. It may be laid down as a general proposition, that a court of equity will not enjoin proceedings in an action at law on behalf of one not a party to the suit which it is sought to enjoin.[6] The converse of this proposition holds equally true, and an injunction will not be granted in aid of a suit at law against one who is not a party to the action in the legal forum.[7] Nor will equity grant relief against an action at law where it satisfactorily appears that the proceedings were undertaken merely at the instigation of another person.[8]

§ 750. Where proceedings under a judgment are enjoined, or an injunction is allowed against a sale of lands under judicial process, it is not proper to join as defendants in the bill merely ministerial officers of the court, such as the clerk who issues process, or the sheriff who serves it, they having no

[1] Hartlepool etc. *v.* West Hartlepool etc., 12 L. T. N. S. 366.
[2] Brown *v.* Pacific etc., 5 Blatch. 525.
[3] Const *v.* Harris, T. & R. 514; Evans *v.* Coventry, 5 DeGex, M. & G. 911.
[4] Mozley *v.* Alston, 1 Ph. 790.
[5] Dilly *v.* Doig, 2 Ves. Jr. 486; Pollock *v.* Lester, 11 Hare, 274.
[6] New York *v.* Connecticut, 4 Dall. 1.
[7] Chamblin *v.* Slichter, 12 Minn. 276.
[8] Pentney etc. *v.* Lynn etc., 13 W. R. 983.

interest in the subject matter in controversy. The injunction operating directly upon the parties to the judgment or proceeding enjoined, is regarded as being operative through them upon all officers of the law acting in consequence of the judgment.[1] An exception is, however, allowed to the rule in cases of fraud, and where there is a fraudulent combination between the officer having the execution in his possession and the judgment creditor, or where the officer is charged with being an active agent in the commission of the fraud, on account of which the judgment is impeached, such officer should be joined as a proper party to the action.[2]

§ 751. Where an injunction is asked against a judgment at law, all the plaintiffs who have obtained the judgment must be made defendants in the injunction suit.[3] But while it is generally the case that judgments may be enjoined only on the application of those who were parties to the proceedings at law, there may be circumstances which require a departure from the rule. Thus, where a judgment has been fraudulently recovered against an agent, and his principals, though not parties to the proceedings, are bound to reimburse him on account thereof, they are proper parties to ask relief in equity against the judgment.[4]

§ 752. Where an injunction is sought restraining a judgment at law in a United States court, which had jurisdiction over all the parties to the action at law, the introduction of new parties in the injunction bill, over whom the court has no jurisdiction, will prevent it from granting the relief prayed.[5] If, however, there be sufficient equity in the case, a stay of proceedings may be granted until relief can be had in the state courts.[6]

§ 753. Questions of great nicety have sometimes arisen in

[1] Edney v. King, 4 Ired. Eq. 465; Lackay v. Curtis, 6 Ired. Eq. 199; Olin v. Hungerford, 10 Ohio, 268.

[2] Olin v. Hungerford, 10 Ohio, 268; Allen v. Medill, 14 Ohio, 445.

[3] Berry v. Berry's Heirs, 3 Monr. 263.

[4] Webster v. Skipwith, 26 Miss. 341.

[5] Dunn v. Clarke, 8 Pet. 1.

[6] Id.

determining who are proper parties to seek relief by injunction against the violation of rights or easements of a public nature. The true test to be applied in all such cases, is to determine whether the persons asking the relief are merely volunteers, or whether they are injured in their individual rights. And while in the latter case the relief will generally be granted, in the former it will be withheld.[1] Thus, the owner of adjacent lots may enjoin the appropriation to private purposes of a square dedicated to the use of the public. The complainant in such a case, being one of the inhabitants of the town, and owning property contiguous to the square, is not a mere volunteer, assuming to protect the rights of others, but is entitled to the aid of equity for the protection of his own interests.[2] But, on the other hand, the owners of lots around a square which has been conveyed to a county for the use of public buildings, have not such an individual interest in the ground as will authorize a court of equity in enjoining, on their application, county commissioners from leasing portions of the ground to private persons, reserving the rent to the county. Such complainants are to be considered as mere volunteers, who sustain no injury to their individual rights, and are not entitled to protection in equity.[3]

§ 754. Where land has been dedicated to the public use for certain specified purposes, an injunction will not usually be allowed to prevent the carrying out of such purposes. Thus, the owner of lands having dedicated a portion of them during his life time for a burial ground and schoolhouse lot, his heir, who is a non-resident, will not be allowed to enjoin the rebuilding of a schoolhouse upon the premises in question. Under such circumstances the erection of a new schoolhouse upon that part of the ground dedicated to school purposes, is

[1] Smith v. Heuston, 6 Ohio, 101; Brown v. Manning, 6 Ohio, 298. In illustration of the same general principle, see Putnam v. Valentine, 5 Ohio, 187.

[2] Brown v. Manning, 6 Ohio, 298.

[3] Smith v. Heuston, 6 Ohio, 101.

no encroachment upon the dedication, and it is error to enjoin its erection.[1]

§ 755. The corporate authorities of a town are proper parties to enjoin a public nuisance. Thus, the erection of buildings upon a public square which has been dedicated as such to the use of the inhabitants of a town, constitutes a public nuisance, which may be enjoined by the corporate authorities.[2] And private persons, specially injured by a nuisance of such a nature, may join with the corporate authorities in filing the bill.[3] Where, however, the bill is filed on behalf of private citizens to restrain a public nuisance, they must show some special and peculiar injury sustained by themselves, independent of and distinct from the common and general injury shared by the public alike, in default of which equity will not interfere.[4]

§ 756. The simplest and most generally accepted test in determining whether one is a proper party complainant to a bill for an injunction, is whether he possesses a legal or equitable interest in the subject matter of the controversy. Applying this test, it has been held that a state was not a proper party to a bill to restrain a county court from issuing bonds and collecting a tax in aid of a railway, the state having no interest, either legal or equitable, in the subject in dispute.[5] And where an action is brought by the attorney general, in the name of the people, to restrain the execution of a resolution of the common council of a municipal corporation, giving a contract for certain labor to persons who were not

[1] Pott v. School Directors, 42 Pa. St. 182.

[2] Trustees etc. v. Cowen, 4 Paige, 510. And see Mayor etc. v. Bolt, 5 Ves. 129.

[3] Trustees etc. v. Cowen, 4 Paige, 510.

[4] Bigelow v. Hartford etc., 14 Conn. 565; O'Brien v. Norwich etc., 17 Conn. 372; Frink v. Lawrence, 20 Conn. 117; Corning v. Lowerre, 6 Johns. Ch. 439; Doolittle v. Supervisors etc., 18 N. Y. 160; Allen v. Board etc., 2 Beas. 68; Hinchman v. Paterson etc., 2 C. E. Green, 75; Mechling v. Kittanning etc., 1 Grant's Cases, 614; Beveridge v. Lacey, 3 Rand. 63; Walker v. Shepardson, 2 Wis. 384; Barnes v. Racine, 4 Wis. 454; Williams v. Smith, 22 Wis. 594.

[5] State v. Parkville etc. 32 Mo. 496.

the lowest bidders, as required by law, neither the contractors nor the bidders need be made parties.[1]

§ 757. Taxpayers and residents of a school district are proper parties to institute proceedings for an injunction against the collection of a tax for the payment of judgments obtained through fraud and collusion against the school district.[2] It is to be observed, however, the tax being upon the individual property of each tax payer, that the injury, if any, is to his individual rights, and does not affect any common interest; it is therefore requisite that each property holder desiring relief against the tax shall bring his separate action, and no one of the number can bring the action in behalf of all.[3]

§ 758. Under a statute authorizing injunctions against defendants for certain specified causes, a garnishee is regarded as a defendant within the terms of the statute, and an injunction may be granted against him as such.[4] But an injunction will not be allowed, before trial at law, to restrain a garnishee from disposing of the debtor's property in his hands, except upon a showing of garnishee's insolvency, and the consequent danger of loss.[5]

§ 759. Where relief by injunction is sought for the protection of the rights of churches and religious bodies, the action is usually brought in the name of the trustees.[6] Thus, the trustees of a church are proper parties complainant to a bill for an injunction against pretended trustees, to restrain them from meddling with the affairs of the church, and the action need not be brought in the name of the state.[7] So the trustees of a voluntary religious association may, on behalf of their church, enjoin the violation of a burial ground dedicated to

[1] People v. Mayor etc., 32 Barb. 35.

[2] Newcomb v. Horton, 18 Wis. 566. And see Williams v. Peinny, 25 Iowa, 436.

[3] Newcomb v. Horton, 18 Wis. 566.

[4] Malley v. Altman, 14 Wis. 22; Almy v. Platt, 16 Wis. 169.

[5] Bigelow v. Andress, 31 Ill. 322.

[6] Trustees etc. v. Hoessli, 13 Wis. 348; Beatty v. Kurtz, 2 Pet. 566.

[7] Trustees etc. v. Hoessli, 13 Wis. 348.

the use of the church by the owner of the soil.[1] And under such circumstances a court of equity will grant relief even against the holder of the legal title.[2]

§ 760. As between principal and agent, relief by injunction is sometimes necessary to prevent the agent from a wrongful conversion or misappropriation of his principal's property. Thus, where certain specific chattels have been delivered to a person to be held by him as agent, and in violation of his duty to his principal he contracts for the sale of the articles to a third person, the principal is entitled to the aid of equity to prevent the agent from parting with or disposing of the goods.[3] So an injunction has been allowed to restrain the transfer of stock in an incorporated company, standing in the name of a steward, upon a strong showing that it was purchased from proceeds of his master's or principal's property.[4]

[1] Beatty v. Kurtz, 2 Pet. 566.
[2] Id.
[3] Wood v. Rowcliffe, 3 Hare, 304.
[4] Chedworth v. Edwards, 8 Ves. 46. But the relief was refused as to money deposited in bank to the account of the steward.

II. General Corporations.

§ 761. Jurisdiction founded in trust; requisites of the bill.
762. Especial caution observed in the exercise of the jurisdiction.
763. Discretionary powers of corporate bodies rarely interfered with.
764. Continuing trespass will warrant the relief.
765. Questions touching possession or forfeiture of chartered rights pertain exclusively to courts of law.
766. Jurisdiction in restraint of banking operations purely statutory.
767. Protection of shareholders a favorite jurisdiction of equity; general rule.
768. Illustrations of general rule; laches a bar to relief.
769. Equity will not permit corporations to imperil rights of private individuals.
770. Corporations may be restrained from transcending purpose for which they were created.
771. Single shareholder entitled to relief regardless of amount of his interest.
772. Applications to legislature for change in powers of incorporated company.
773. When interlocutory relief allowed.
774. Writ not allowed to restrain acts in furtherance of objects of incorporation.
775. Foreign corporations; companies incorporated in two different states.
776. Merger of incorporated companies may be enjoined.
777. Stockholder's consent may debar him from relief.
778. Writ not allowed where stockholder stands in position of general creditor.
779. Relief against voting on excess of stock; fraudulent transfers.
780. Relief refused against enforcement of judgment for debt properly contracted.
781. Equity will not interfere with corporate elections; misjoinder of parties.
782. When corporation may be enjoined from collecting subscriptions.

§ 761. The jurisdiction of equity to control or restrain the operations of corporate bodies, while it is exercised upon the same general principles which govern in other cases, may not inappropriately be considered as a branch of the general jurisdiction of courts of equity over the subject of trusts. And unless a breach of trust can be satisfactorily established,

an injunction will rarely be allowed to restrain the application of corporate property or funds to other than corporate purposes.[1] Where, however, the existence of a trust is established, or corporate property is affected by a trust, equity will interfere for its enforcement and for the protection of the rights of members of the corporation.[2] And the right of any member of a corporate body to invoke the aid of equity to prevent a breach of trust by the majority of the members, may be regarded as well established.[3] To warrant a court of equity in interfering with the proceedings of an incorporated company in the construction of its works, two things must concur: first, it must appear that the company is transcending its charter; and secondly, that the interposition of equity is necessary to prevent an injury which can not be adequately compensated in damages at law.[4] And while fraud constitutes strong ground for invoking the aid of equity in restraint of the action of corporate bodies, relief by injunction will not be allowed upon mere general averments in the bill of complainant's belief of collusive and corrupt conduct. It must either appear from the bill itself that the proceedings sought to be enjoined are void, or particular acts of fraud or *prima facie* evidence of collusion must be shown, and must be positively sworn to.[5]

§ 762. Especial caution is observed by courts of equity in granting injunctions whose effect would be to interfere with or suspend the operations of important public works which are being carried on by corporations. The power of granting injunctions, being one of the extraordinary powers of chancery, its improper exercise in cases of public works would be productive of serious injury. The jurisdiction in such cases should therefore be exercised only for the prevention of

[1] Evan v. Avon, 29 Beav. 144; Attorney General v. Carmarthen, Cooper, 80.

[2] Wiswell v. First Church, 14 Ohio St. 81; Dummer v. Chippenham, 14 Ves 245; Attorney General v. Mayor etc., 1 Bligh, N. S. 312.

[3] Wiswell v. First etc., 14 Ohio St. 81.

[4] James River etc. v. Anderson, 12 Leigh, 278; Gartside v. East St. Louis 43 Ill. 47.

[5] Champlin v. Mayor etc., 3 Paige, 573.

irreparable mischief, or where the injury complained of is so great and the risk so imminent that no prudent man would think of incurring it.[1] Nor should the court interfere where the right of the party complaining is doubtful, or where an action at law or in chancery, prosecuted in the ordinary mode, will afford adequate redress.[2] And an injunction to restrain the operations of a large company or corporation, should rarely be granted without notice, on account of the mischief which might otherwise ensue. It is held, however, that a court of equity may properly exercise its discretion in such cases, and the fact that the writ has been allowed without notice, is not of itself sufficient to warrant a dissolution, even though the chancellor might have exercised the discretion differently from the master who granted the injunction.[3]

§ 763. Courts of equity rarely interfere with the exercise of discretionary powers by corporate bodies or their officers, to whom such powers are confided. And it is a well-established principle of equity, that where acts requiring the exercise of judgment, science and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed, nor will such officers be enjoined, except when abusing their power to the injury of others.[4] Thus, equity will not interfere by injunction with the discretionary power of a board of canal commissioners in regulating the quantity of water necessary for canal purposes, upon the complaint of persons claiming an interest in the water.[5] Complainants in such case, through whose land the canal passes, have no such vested right as authorizes them to interfere with the discretionary power reposed in the proper officers.[6] And in a controverted question as to the expediency of the location of a railway,

[1] Stewart v. Little Miami etc., 14 Ohio, 353.

[2] Id.

[3] Ross v. Elizabeth etc., 1 Green Ch. 422; Capner v. Flemington etc., 2 Green Ch. 467; Perkins v. Collins, Ib. 482.

[4] Walker v. Mad River etc., 8 Ohio, 38; Cooper v. Williams, 4 Ohio, 253.

[5] Cooper v. Williams, 4 Ohio, 253.

[6] Id.

where the decision has been confided to the professional judgment and skill of the officers of the corporation, equity will not restrain them in the exercise of that discretion, upon the application of a person not otherwise affected or injured than by the actual location passing through his land.[1] It is to be observed, however, that the discretion of all public agents, especially in the appropriation of private property for public uses, must be brought to the test of legal judgment, and equity may enjoin when in the exercise of that discretion such public agents overstep the conditions necessary for the public welfare.[2]

§ 764. Where a corporation of a *quasi* public nature, as a canal company, is about to do a permanent injury to private property, under the pretext of improving its works, the act, though a trespass in its nature, being a continuous one, will warrant the interposition of equity. Under such circumstances the trespass itself is aggravated by the abuse of authority by the officers and agents of the corporation, under color of their office, and such official oppression affords strong ground for the exercise of the extraordinary power of equity through the writ of injunction.[3] Nor in such case will a court of equity require so strong a showing of irreparable injury before granting the relief as is required to justify an injunction against private persons.[4]

§ 765. In connection with the general subject of the interference of equity to restrain the abuse of corporate powers, it is to be observed that questions concerning the possession or forfeiture of chartered rights belong exclusively to courts of law, and are not cognizable in equity. Hence, an injunction will not be allowed against the operations of a banking corporation on the ground that its affairs are being so conducted as to work a forfeiture of its chartered rights.[5] Nor is the exer-

[1] Walker *v.* Mad River etc., 8 Ohio, 88.

[2] Cooper *v.* Williams, 4 Ohio, 253.

[3] Ryan *v.* Brown, 18 Mich. 212. And see Osborn *v.* United States Bank, 9 Wheat. 738.

[4] Ryan *v.* Brown, 18 Mich. 212.

[5] Attorney General *v.* Bank of Niagara, Hopk. Ch. 354.

cise of banking privileges without authority, a nuisance which calls for the restraining power of a court of equity, even though it is alleged that the bank is insolvent, and is buying up its own paper at a discount.[1]

§ 766. The jurisdiction of equity in restraining the operations of banking institutions is purely statutory, and no warrant for its exercise is found in the general equity powers of the court.[2] And where the insolvency of a banking corporation is relied upon as the ground for enjoining its operations, mere affidavits on information and belief are not sufficient to warrant an injunction, especially when they are directly contradictory to the regular, official reports of the bank, made under oath and published according to law.[3] Nor is the court at liberty to infer insolvency, and issue an injunction from the mere fact of the suspension of specie payments.[4]

§ 767. The protection of the rights of shareholders in incorporated companies against the improper or illegal action of other shareholders, or of the officers of the company, is a favorite branch of the jurisdiction of equity by injunction. And it may be asserted as a general rule, that courts of equity will enjoin, on behalf of the stockholders of an incorporated company, any improper alienation or disposition of the corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchise, as well as the improper management of the business of the company, or a wrongful diversion of its funds.[5] And in such cases equity may grant relief at the suit of a single stockholder.[6] So if the managers

[1] Attorney General v. Bank of Niagara, Hopk. Ch. 354.

[2] Attorney General v. Bank etc., Harring. Mich. 315.

[3] Livingston v. Bank of New York, 26 Barb. 304.

[4] Id.

[5] Kean v. Johnson, 1 Stockt. 401, a leading American case; Manderson v. Commercial etc., 28 Pa. St. 379; Sears v. Hotchkiss, 25 Conn. 171; Bagshaw v. Eastern etc., 7 Hare, 114; Colman v. Eastern etc., 10 Beav. 1; Attorney General v. Great etc., 1 Dr. & Sm. 154; Central etc. v. Collins, 40 Geo. 582.

[6] Kean v. Johnson, 1 Stockt. 401; Mozley v. Alston, 1 Ph. 798; Simpson v. Westminster etc., 8 H. L. 717. And see Gifford v. New Jersey etc., 2 Stockt. 171, where the same principle is upheld, though the injunction seems to have been refused on other grounds.

of the company are about to engage in any enterprise not contemplated by their charter, or are proceeding to apply corporate funds to any other than corporate purposes, or, in general, if they are transcending their charter, equity will interfere.[1] And where a railway company, without authority of law, is proceeding to become a stockholder in another company, it may be enjoined by its stockholders from thus transcending its charter, the relief being granted, as well for the protection of the stockholders, as because the proceedings are contrary to public policy.[2]

§ 768. In accordance with the principles laid down in the preceding section, it has been held that shareholders in a bank are entitled to an injunction against the officers of the bank, to prevent the continued commission of acts which are contrary to law, and which endanger the existence of the charter;[3] and this even where, from the affidavits exhibited on both sides, the truth of the charge is left somewhat in doubt, since the awarding of an injunction under such circumstances can work no injury, and only affords the stockholders a proper measure of protection.[4] So a minority of the stockholders of a corporation, some of whom are also directors, may enjoin the remaining stockholders, who control a larger portion of the stock, and constitute a majority of the board of directors, from fraudulently mismanaging the business, or diverting the funds.[5] But while the jurisdiction of equity to enjoin any unauthorized departure from the original objects of an incorporation is unquestioned, a stockholder, invoking the aid of the court by injunction in such a case, must show promptness and diligence in the assertion of his rights, and if he waits

[1] Smith v. Bangs, 15 Ill. 399; Beman v. Rufford, 6 Eng. Law & Eq. R. 106; Simpson v. Denison, 10 Hare, 51.

[2] Central etc. v. Collins, 40 Geo. 582.

[3] Manderson v. Commercial etc., 28 Pa. St. 379.

[4] Id.

[5] Sears v. Hotchkiss, 25 Conn. 171. And it is held that the fact that a remedy at law exists by an action on behalf of the corporation, or of the aggrieved stockholders, against the wrong doers, constitutes no bar to an injunction in such a case. Id.

until large sums of money have been expended and great public interests created, he will not be allowed to enjoin.[1]

§ 769. Corporations may be restrained from any gross abuse of their powers resulting in injury to individuals, since equity will not permit corporate bodies, with whom it is always difficult to deal upon equal terms, to take, under color of authority, proceedings of doubtful legality, if by so doing they place those against whom their proceedings are directed in a position of peril, from which it would be difficult to extricate themselves.[2]

§ 770. Where corporations are created by law for special purposes, they may properly be restrained in equity from exceeding the legitimate scope of their authority, or going beyond the purposes for which they were created.[3] Thus, a railway company has been enjoined from conducting the business of coal merchants, the company having been created for the specific purpose of constructing a railway. And the action may be properly brought in such case by the attorney general on the relation of a private person having no interest in the company.[4] So a shareholder, suing on behalf of himself and all other shareholders of a railway company, may enjoin the company from using its funds in establishing a steam packet company in connection with the railway.[5] So, too, the relief will be allowed to prevent a railway company from purchasing shares in another company.[6]

§ 771. Where relief in equity is sought by an aggrieved shareholder against any mismanagement of the corporate busi-

[1] Goodin *v.* Cincinnati etc. R. R., 18 Ohio St. 169. And see Chapman *v.* Railroad Co's., 6 Ohio St. 186.

[2] Mayor etc. *v.* Groshon, 30 Md. 436.

[3] Attorney General *v.* Great etc., 1 Dr. & Sm. 154; Colman *v.* Eastern etc., 10 Beav. 1; Salomons *v.* Laing, 12 Beav. 339.

[4] Attorney General *v.* Great etc., 1 Dr. & Sm. 154. It was asserted by Vice Chancellor Wood in this case to be a "principle of public policy, that where parliament has authorized a company to raise a large capital for a specific purpose, the privilege confers no right upon the company to employ its capital in competition with the general public, upon speculations of a different kind."

[5] Colman *v.* Eastern etc., 10 Beav. 1.

[6] Salomons *v.* Laing, 12 Beav. 339.

ness, or misappropriation of corporate funds, the amount of the interest of such shareholder will not be considered in granting the relief.[1] And a single shareholder, suing on behalf of himself and all others having a common interest with him, is entitled to the aid of equity to prevent a diversion of corporate funds to other than corporate purposes, though all the other members of the company are opposed to him.[2] Since, while the members and shareholders of an incorporated company may possibly change the contract which they have entered into with each other, and form a new one by common consent of all parties, they have no right so to do without the consent of every shareholder in the company.[3] A shareholder must, however, use due diligence in the assertion of his rights, to entitle him to relief in equity against a wrongful diversion of corporate funds, or other misconduct on the part of the company, and negligence on his part in instituting proceedings will deprive him of the relief desired.[4] And where a corporation departs from the original object of its charter, without the consent of all its stockholders, he who would avail himself of the remedy by injunction, must show that he has been prompt and vigilant in claiming the aid of equity, since if he waits until the mischief complained of is accomplished, he will be held to have acquiesced in the change.[5]

§ 772. Some apparent conflict is to be found in the adjudicated cases, upon the right of stockholders to restrain corporate authorities from taking steps to change the powers or extend the business of the company, by invoking legislative action for that purpose. This conflict is, however, more apparent than real, and no difficulty will be found in reconciling the decisions, by observing the distinction between

[1] McDonnell *v.* Grand etc., 3 Ir. Ch. 578.

[2] Kean *v.* Johnson, 1 Stockt. 401; Mozley *v.* Alston, 1 Ph. 798; Simpson *v.* Westminster etc., 8 H. L. 717; Beman *v.* Rufford, 1 Sim. N. S. 564.

[3] Ernest *v.* Nicholls, 6 H. L. 401; *Ex parte* Morgan, 1 Mac. & G. 236.

[4] Gregory *v.* Patchett, 33 Beav. 595; Kent *v.* Jackson, 14 Beav. 367; Gray *v.* Chaplin, 2 Russ. 126; Chapman *v.* Mad River etc., 6 Ohio St. 119.

[5] Chapman *v.* Mad River etc., 6 Ohio St. 119.

cases of a simple application to the legislative authority for a change in the constitution or powers of an incorporated company, and cases where it is sought to divert corporate funds from their legitimate use for defraying the expenses of such an application. The right of a company, acting in its corporate capacity, to invoke legislative aid for changing the objects and powers of the corporation, is unquestioned, and equity will not, at the suit of a shareholder of a company incorporated by act of parliament, enjoin an application to parliament for a change in the constitution of the company, by extending its powers or substituting a new body for the old.[1] But where it is attempted to use corporate funds for defraying the expenses of such an application, and for procuring an extension of the business of the company beyond the legitimate objects for which it was constituted, an injunction may be allowed, at the suit of shareholders, to prevent such improper diversion of the funds.[2]

§ 773. Notwithstanding the general rule laid down in the preceding section, that equity will not enjoin an application to the legislature for an extension of the powers of an incorporated company, relief may properly be granted against an application whose object is the destruction of the existing corporation. And where a majority of the members of a company are taking steps to surrender their charter, with a view to obtaining a new one, for a purpose entirely different from that originally contemplated in the creation of the corporation, the minority of the shareholders may rightfully enjoin the proceedings until a hearing.[3]

§ 774. Although a shareholder may properly enjoin a corporation from employing its property in a way wholly or materially different from that which was designed by the act of incorporation, yet he will not be allowed to enjoin the doing of acts in direct furtherance of the object of its creation, and which are for the benefit of all the stockholders as such, even

[1] Ware v. Grand etc., 2 Russ. & M. 470; Stevens v. South etc., 13 Beav. 49.

[2] Simpson v. Denison, 10 Hare, 62; Munt v. Shrewsbury etc., 13 Beav. 1; Stevens v. South etc., Ib. 49.

[3] Ward v. Society etc., 1 Coll 370.

though such acts may be injurious to the party complaining, in another capacity than that of stockholder, and although the interests of other persons or of the public may be injuriously affected thereby.[1] Nor will a court of equity, at the suit of stockholders of a corporation, restrain its officers from the exercise of their functions, since such restraint would be equivalent to removal from office, and over such a subject equity has no jurisdiction.[2]

§ 775. The directors of a foreign corporation will not be enjoined from payment of a dividend, at the suit of one to whom no debt is due from the corporation, and whose only ground for the injunction is a supposed error on the part of the directors in making the dividend. In such a case complainant will be left to his redress in the state in which the company was incorporated.[3] But where the directors of a company incorporated in two different states, have made issues of stock which are illegal and void, they may be restrained from using the proceeds of the sale of such stock, until both the states in which the company was incorporated have ratified the issue alleged to be illegal and void.[4] But the injunction in such a case will only be allowed to stand as to the illegal issue, and dealings in the genuine stock will not be enjoined, nor will the general business of the company be interfered with.[5] And an injunction restraining the use of the proceeds of sale of new stock, issued by the directors of a foreign corporation, will not be continued where both of the states in which the company was incorporated have recognized the validity of the issue of the stock against which the writ was directed.[6]

§ 776. A consolidation or merger of one incorporated company with another, without authority and without consent of the stockholders, as required by the articles of association,

[1] Baltimore etc. v. Wheeling, 13 Grat. 40.
[2] Bayless v. Orne, Freem. Ch. 161.
[3] Howell v. Chicago etc., 51 Barb. 378.
[4] Fisk v. Chicago etc., 53 Barb. 513.
[5] Id.
[6] O'Brien v. Chicago etc., 53 Barb. 568.

may, as to the property not yet transferred, be enjoined until the final hearing of the cause.[1] But the new company will not be enjoined from the use of property already transferred, nor will it be restrained from receiving from the stockholders of the old company a surrender of their stock, for the purpose of merging it in the new association.[2]

§ 777. Where the conduct of the person complaining has been such as to amount to a waiver of his right to object to a proposed conversion of the corporate funds to other than the uses for which they were originally intended, he will not be allowed relief in equity against such use of the funds. Thus, where a depositor in a savings bank has consented that his deposits may be converted into stock, as a security for the payment of the debts of the corporation, and his conduct has been such as to amount to a voluntary dedication of his stock for the purpose of securing the debts, he is regarded as estopped from claiming relief in equity, and an injunction will be refused.[3]

§ 778. A shareholder of a corporation, claiming that he has been defrauded in the issue of stock, can not enjoin the corporation from disposing of so much of its property as would indemnify him for his loss, since the money which he has contributed having been mixed with the general funds, he stands in no better position than that of a general creditor of the corporation.[4]

§ 779. An injunction will not be allowed upon a bill filed by a minority of a board of directors, to restrain a stockholder from voting upon an alleged excess of stock in his possession, when no steps have been taken by the company to cancel the excess of stock.[5] But where the rights of a portion of the stockholders of an incorporation are prejudiced by the conduct of another portion, who are also directors, and who have improperly caused certain shares to be transferred to them for

[1] Blatchford v. Ross, 54 Barb. 42.
[2] Id.
[3] Maryland etc. v. Schroeder, 8 Gill & J. 93.
[4] Whelpley v. Erie etc., 6 Blatch. 271.
[5] Reed v. Jones, 6 Wis. 680.

the purpose of retaining themselves in office, an injunction will be allowed to prevent defendants from voting on the stock thus improperly transferred.[1] And where relief by injunction is sought against a corporation, to prevent a fraudulent sale of corporate property to one who is not made a party to the bill, such non-joinder is not demurrable.[2] But, though an officer of an incorporated company who has made illegal and unauthorized issues of stock to himself, may be enjoined from transferring such stock to a third person, the relief will be allowed only on a proper showing of the illegality of the issues and of the proposed transfer.[3]

§ 780. Notwithstanding courts of equity may properly interfere at the suit of stockholders for the protection of an incorporated company, yet where a debt authorized by the company has been created by and with the consent of the shareholders and directors, and judgment is confessed therefor, a consenting shareholder is estopped from enjoining an execution under such judgment.[4] Nor will an injunction be allowed against the proceedings of a corporation at the suit of a stockholder, when it appears that his bill is not filed *bona fide* for his own protection, but is only a private bill in aid of other persons.[5]

§ 781. Courts of equity will neither entertain jurisdiction over corporate elections, nor will they determine the right to a corporate office, since such questions are properly cognizable only in courts of law, the true remedy being by an action at law in the nature of a *quo warranto*.[6] Nor is the fact that relief in such a case is claimed on the ground of fraud, sufficient to warrant equity in entertaining jurisdiction for the purpose of granting an injunction.[7] And where the court may properly exercise its jurisdiction, a defect in the joinder

[1] Hilles v. Parish, 1 McCart. 380.
[2] Abbot v. American etc., 4 Blatch. 489.
[3] Sherman v. Clark, 4 Nev. 138.
[4] Gravenstine's Appeal, 49 Pa. St. 310.
[5] Sparhawk v. Union etc., 54 Pa. St. 401.
[6] Hartt v. Harvey, 32 Barb. 55. And see Mickles v. Rochester etc., 11 Paige, 118.
[7] Hartt v. Harvey, 32 Barb. 55.

of parties may sometimes prove an effectual bar to granting the relief. Thus, where a bill charges unlawful and improper conduct on the part of a corporation, but prays an injunction against the president, directors and agents, without asking that the writ issue against the corporation itself, such omission is fatal, if insisted upon by defendant.[1]

§ 782. We have already seen that equity will enjoin any improper diversion of corporate funds for other than corporate purposes, and will restrain the managers of a company from engaging in any enterprise not contemplated by the articles of incorporation.[2] The jurisdiction extends even further; and where an incorporated company ceases to prosecute the work for which it was created, and attempts to misapply its funds, or attempts any radical change in the character of the enterprise in which it is engaged, it may be enjoined from collecting the obligations given to support the original undertaking.[3] Where, however, the principal object of the bill is the appointment of a receiver for the management of the affairs of a railway corporation, the directors and officers of the company will not be enjoined from acting in their official capacity, where such restraint is not necessary for the accomplishment of the principal object of the bill.[4]

[1] Binney's Case, 2 Bland, 99.

[2] Kean *v.* Johnson, 1 Stockt. 401; Smith *v.* Bangs, 15 Ill. 399; Sears *v.* Hotchkiss, 25 Conn. 171.

[3] Illinois etc. *v.* Cook, 29 Ill. 237.

[4] Stevens *v.* Davison, 18 Grat. 819.

III. Municipal Corporations.

§ 783. Injunctions against municipal corporations founded in trust.
784. Illegal acts, resulting in heavy burdens to tax payers, will be enjoined.
785. Exercise of discretion by municipal authorities will not be enjoined.
786. Fraud a condition of obtaining the relief; right must be clear.
787. Passage of ordinances and resolutions not usually enjoined.
788. Nuisances.
789. Illegal appropriation of private property enjoined; opening of streets.
790. Opening of streets.
791. Holders of municipal securities.
792. Use of schoolhouse for religious purposes enjoined.
793. Misappropriation of land dedicated to public use, or of public funds, will be enjoined.
794. Party aggrieved must show special injury.
795. Writ not granted against removal of market house.

§ 783. The jurisdiction of courts of equity to restrain the proceedings of municipal corporations, at the suit of citizens and tax payers, where such proceedings encroach upon private rights and are productive of irreparable injury, may be regarded as well established.[1] In the exercise of the jurisdiction, the courts proceed upon the same principles which govern their interference in cases of trusts, a municipal corporation being regarded in equity as charged with and made the depositary of a public trust, and thus amenable to the jurisdiction of equity for a breach of that trust.[2] Thus, a city government, being a municipal corporation entrusted with the care of the city property, if it disposes of property, or grants privileges or franchises, without consideration and with no profit to the city, where a proper disposition of such privi-

[1] Christopher v. Mayor etc., 13 Barb. 567; Milhau v. Sharp, 15 Barb. 193; Stuyvesant v. Pearsall, Ib. 244; Lumsden v. Milwaukee, 8 Wis. 485; Smith v. Appleton, 19 Wis. 468; Dudley v. Trustees etc., 12 B. Mon. 610.

[2] Milhau v. Sharp, 15 Barb. 193; Stuyvesant v. Pearsall, Ib. 244.

leges would inure largely to the benefit of the city, such a breach of trust is committed as calls for the interposition of equity by injunction.[1]

§ 784. When an act about to be committed by a municipal corporation is clearly illegal, and its necessary effect will be to impose heavy burdens upon the property of citizens and tax payers, a court of equity is warranted in interfering by injunction for the prevention of such act.[2] In such case a more prompt and efficacious remedy is demanded than is afforded by the tardy action of courts of law, and equity alone can administer the necessary relief by the exercise of its extraordinary power by injunction. And the municipal government of a city or town, being entrusted with the control and disposition of municipal affairs, for the benefit and protection of citizens and tax payers, such persons are proper parties to a bill for an injunction against the improper exercise of municipal authority.[3]

§ 785. No principle of equity jurisprudence is better established, than that courts of equity will not sit in review of the proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed.[4] And the fact that the court would have exercised the discretion in a different manner, will not warrant it in departing from the rule. Thus, a mere difference of opinion between a court of equity and a municipal corporation as to the proper rate of ferriage to be charged, where the corporation is by its charter vested with the control of certain ferries, and as incidental thereto the right of establishing a tariff of prices, will not justify the court in granting an injunction.[5] So a property owner in a city is not entitled to an injunction to restrain the construction

[1] Milhau v. Sharp, 15 Barb. 193; Stuyvesant v. Pearsall, Ib. 244.

[2] Christopher v. Mayor etc., 13 Barb. 567.

[3] Milhau v. Sharp, 15 Barb. 193; Stuyvesant v. Pearsall, Ib. 244; Christopher v. Mayor etc., 13 Barb. 567.

[4] Kelsey v. King, 32 Barb. 410; People v. Mayor, etc., Ib. 102.

[5] People v. Mayor etc., 32 Barb. 102.

of a sewer, on the ground of omissions and irregularities in the proceedings of the municipal authorities in opening the streets, the proper remedy being at law by the writ of *certiorari*.[1] Nor in such case will the relief be allowed because the contract entered into by the corporation with the builders of the sewer is defective in form or in the parties thereto.[2]

§ 786. A municipal corporation will not be restrained from entering into any contract within the scope of its authority and the purposes for which it was created, where no fraud or corruption is alleged in the conduct of the corporate authorities in making the contract, the only ground for the injunction being a statute which the court construes to be unconstitutional and void.[3] And the questions of right involved must generally be clearly and definitely settled before equity will interfere with the action of municipal bodies, and where the purpose of an injunction is to restrain certain action of the common council of a city, but the right in issue is so indefinite as to be a perpetual source of dispute, and the rights of the corporation would probably be disastrously affected by the injunction, it will not be granted.[4]

§ 787. The passage of resolutions and the adoption of ordinances by the common council of a municipal government, being legislative acts, will not be prevented by injunction. A distinction, however, is properly drawn between the case of restraining an illegal act attempted under the authority and sanction of a municipal body, and restraining the corporation itself from granting such authority. And while courts of equity will not enjoin municipal bodies from the passage of ordinances or resolutions, yet after the passage of such ordinances or resolutions, the courts may and will, on a proper case being shown, prevent their enforcement, and for this purpose will enjoin all proceedings.[5] So it has been held that the

[1] Kelsey v. King, 32 Barb. 410.

[2] Id.

[3] Pullman v. Mayor etc., 54 Barb. 169.

[4] Municipality No. 1 v. Municipality No. 2, 12 La. 49.

[5] Whitney v. Mayor etc., 28 Barb. 233; People v. Mayor etc., 32 Barb. 85; Pullman v. Mayor etc., 49 Barb. 57; Mayor etc. v. Gill, 31 Md. 375.

common council of a city may be restrained from enforcing an ordinance authorizing the making of a contract *ultra vires*, and which would be void if made.[1] But to warrant the relief in any case it must appear that the acts complained of are of such a character that full and adequate redress can not be had at law.[2] And equity will not interfere to prevent the enforcement of a city ordinance simply on the ground of its illegality, nor will it assume jurisdiction to question the lawful election of officers, or the validity of the ordinance *per se*, for the purpose of protecting citizens from an uncertain and remote injury.[3]

§ 788. Equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation, restraining a certain act, unless the act is shown to be a nuisance *per se*.[4] And where a body of commissioners, as a

[1] Pullman *v.* Mayor etc., 49 Barb. 57.

[2] Gartside *v.* East St. Louis, 43 Ill. 47.

[3] Kearney *v.* Andrews, 2 Stockt. 70. This was a bill to restrain the enforcement of certain ordinances for altering the grade of streets, on the ground of their illegality. Williamson, Chancellor, says: "These complainants claim the protection of the court because 'they are holders of real estate in said city, and the situation and value of the property of each of them is directly involved in the said proceeding going on and threatened; and because, in most cases, the proceedings going on are really useless, and will tend to depreciate their property in value.' If the court can interfere on these grounds, then the owner of land within the jurisdiction of a municipal corporation may question, in this court, the validity of any ordinance of the corporate authorities respecting any real estate within its limits, because the value of his property may be affected by it. This would be assuming a jurisdiction to try the lawful election of officers and the validity of ordinances of corporate bodies upon too slight grounds. How are 'the situation and value of the property of each of these complainants directly involved in these proceedings?' The mere allegation, amounting to a speculative opinion only of these complainants, is not sufficient for the court to act upon. The injury must be specified, and so pointed out that the court can see it must be an inevitable consequence of the act threatened and complained of." But see Wood *v.* Brooklyn, 14 Barb. 425, where it is held that the enforcement by a municipal corporation of an ordinance which is in violation of the laws of the state, and therefore void, may be enjoined.

[4] Mayor etc. *v.* Thorne, 7 Paige, 261. In this case an injunction was dissolved, which had been granted at the instance of a city, against certain parties for violation of an ordinance prohibiting the manufacture of pressed hay.

board of health, appointed by the executive power of the state, and having no authority for exercising the powers of local legislation, attempt by an ordinance to abate as a nuisance that which is not a nuisance at common law, their proceedings may be properly enjoined.[1]

§ 789. A municipal corporation which is about to make a permanent appropriation of private property to the use of the public, without having taken the requisite steps to determine the necessity for such appropriation, may be enjoined from so doing.[2] But a court of equity will not, at the suit of a municipal corporation, enjoin individual owners of property, to be affected by the proposed opening of a street, from making improvements and building thereon, where the corporation has only taken the initiatory steps toward opening the street, and the provisions of the statute have not yet been complied with.[3] In such case, the corporation, showing no vested right, either legal or equitable, which is likely to be injured by the proposed action, is not entitled to the interposition of equity.[4]

§ 790. Where a municipal corporation has complied with all the statutory requirements for the opening of a street, its proceedings will not be enjoined upon mere general averments in the bill of complainant's belief of collusive and partial conduct on the part of the corporate authorities.[5] And where by a city charter its corporate authorities are vested with exclusive control over the streets, and they grant permission to a railway company to locate its track along the line of a certain street, the owners of property fronting thereon will not be permitted to enjoin the laying of the track.[6] But after a street has been regularly laid out and opened, of a specified width, the common council can not authorize owners of adjoining lots to reduce the width, and

[1] Schuster v. Metropolitan etc., 49 Barb. 450.
[2] Lumsden v. Milwaukee, 8 Wis. 485.
[3] New York v. Mapes, 6 Johns. Ch. 46.
[4] Id.
[5] Champlin v. Mayor etc., 3 Paige, 573.
[6] Moses v. Pittsburgh etc., 21 Ill. 516.

may be restrained from attempting so to do.[1] So, too, the corporate authorities of a town may be enjoined from encroaching upon the property of private citizens, although such encroachment is made under pretense of preventing obstructions to streets and alleys.[2]

§ 791. The holder of a county order is treated as a mere general creditor of the county, and as such he can not, before judgment, on his own order and on the return of an execution *nulla bona*, enjoin the county from the exercise of its general right to manage and dispose of its property.[3] But the holder of a city bond may restrain the city council from issuing bonds, under an act of legislature, in violation of the act under which the first bonds were issued, the former act providing that the city should thereafter issue no bonds except for the payment of its indebtedness. Such a provision in the original act becomes a part of the contract, and its violation by the city may be properly enjoined.[4] But a court of equity will not interfere on behalf of a county to enjoin the payment of a debt which has the sanction of moral obligation.[5]

§ 792. Any misappropriation or wrongful use of corporate property is a fraud upon the rights of corporators, and may be prevented by the aid of equity, where courts of law are powerless to grant the necessary relief. Thus, the use of a schoolhouse by the inhabitants of the school district for religious purposes, against the wishes of any tax payer of the district, is an improper use of the corporate property, although the district may have voted to permit such use. And in such case any tax payer of the district is entitled to an injunction,

[1] Lawrence *v.* Mayor etc., 2 Barb. 577.

[2] Dudley *v.* Trustees etc., 12 B. Mon. 610.

[3] Montague *v.* Horton, 12 Wis. 599. And it is held in this case that the code of procedure has not enlarged the former jurisdiction of courts of equity to grant injunctions restraining the proceedings of subordinate tribunals, or the official acts of public officers, except in the case of temporary injunctions *pendente lite*, which may be granted under the code, whether the action be legal or equitable.

[4] Smith *v.* Appleton, 19 Wis. 468.

[5] County etc. *v.* Hunt, 5 Ohio St. 488.

though the injury sustained by him in person be exceedingly slight, since he can have no adequate remedy at law.[1]

§ 793. The rule may be broadly stated, that courts of equity have undoubted jurisdiction to interfere by injunction when the corporate authorities of a city are taking improper or illegal proceedings, under claim of right, to do an act injurious to the rights of citizens and property holders. Thus, where land has been dedicated to a particular purpose, and the common council of a city has appropriated it to another and an entirely different purpose, sufficient ground exists for an injunction, at the suit of the owners of lots adjacent to the street or square which it is sought to appropriate to a use other than that for which it was originally designed.[2] And where the supervisors of a county are attempting to misapply the county funds, an injunction is the proper remedy to prevent their action.[3] So where the authorities of a county attempt to appropriate and pay to a judge, as a mere gratuity, any portion of the county funds, such appropriation not being authorized by law, an injunction will be allowed to prevent its payment. And where, for the purpose of evading the injunction, the supervisors rescind the first order appropriating the money, and pass a second one to effect the same result, a supplemental bill and injunction will not be required, since the first injunction covers the entire case.[4]

[1] Scofield v. Eighth School District, 27 Conn. 499.

[2] Cooper v. Alden, Harring. Mich. 72. In this case the common council of the city of Detroit had leased a portion of a public street in which to lay a railway track.

[3] Colton v. Hanchett, 18 Ill. 615.

[4] Perry v. Kinnear, 42 Ill. 160. And see Beauchamp v. Board etc., 45 Ill. 274. Walker, Chief Justice, pronouncing the opinion of the court in Perry v. Kinnear, says: "In the absence of some law authorizing the performance of the act the board has no power to make such an appropriation. And being unauthorized and illegal, its consummation should have been restrained. By an unauthorized tax the citizen is deprived of his property without sanction of law. And bodies created for the discharge of public duties, and to aid in conducting the affairs of counties, have not been intrusted with the power to seize and appropriate the property of the people to any but legal purposes. The inhabitants of the state have been secured in the possession and enjoyment of their property against,

§ 794. To warrant the interference of equity in this class of cases, the aggrieved party must show that some special and peculiar injury, personal to himself, is likely to result from the act complained of, aside from the general injury to the public.[1] Some conflict of authority exists as to what constitutes such special injury as will warrant a court of equity in interfering, but the better doctrine seems to be, that tax payers of a municipal corporation, as a city or county, whose burdens of taxation are increased by the misappropriations of public funds by municipal officers, sustain such special damage as to entitle them to the relief.[2] Thus, the enforcement of a city ordinance which is unconstitutional and void, and which seeks to impose a debt upon the city, may be enjoined by property owners and tax payers of the city.[3] So where a board of county commissioners is proceeding without authority of law to appropriate county funds in aid of the construction of a railway, a tax payer of the county has such an interest in the public funds as enables him to maintain a bill for an injunction.[4] And the owner of a state bond, the value of which is

as well the officer created by law as private persons. The former can only exercise power to deprive him of it, in the mode and for the purposes constitutionally authorized by law. If his property may be seized for one illegal purpose, it may for another, and all protection ceases. The power to levy and collect taxes is a power to take from the citizen his money, with or without his consent, and when it is attempted to exercise such a power, courts will not hesitate to afford preventive relief. And, as this was an attempt to exercise unauthorized powers and wrongfully to appropriate the money of the citizens of the county, the court below should have overruled the motion to dissolve the injunction. And for this error, the decree of the court below must be reversed and the cause remanded."

[1] Jones *v.* Little Rock, 25 Ark. 301.

[2] Mayor etc. *v.* Gill, 31 Md. 375; Harney *v.* Indianapolis etc., 32 Ind. 244. But see, *contra*, Craft *v.* Jackson Co., 5 Kan. 518.

[3] Mayor etc. *v.* Gill, 31 Md. 375.

[4] Harney *v.* Indianapolis etc., 32 Ind. 244. Say the Court, Frazer, C. J.: * * * "But it is contended that a tax payer has no such interest in the funds belonging to the county treasury as will enable him to maintain a suit to prevent unlawful appropriations thereof. We can not regard this question as open to further discussion in this court. It has been a common remedy in this state, and has been sanctioned by repeated judgments here. Lafayette *v.* Cox, 5 Ind. 38; Oliver *v.* Keightley, 24 Ind. 514.

being depreciated and its security diminished by the improper diversion of the public funds by the state treasurer, may enjoin the treasurer, since he has a direct and peculiar interest in the preservation and lawful administration of the funds of the state, aside from his general interest as a citizen.[1]

§ 795. Where, by the provisions of its charter, general authority is conferred upon a city to establish and regulate markets and market places, the corporate officers will not, in the absence of any threatened abuse of corporate authority, be enjoined from removing a market house, and tax payers, as such, have no sufficient ground for preventing the removal by injunction, whatever rights adjacent proprietors and others injuriously affected may have.[2]

It has been sanctioned elsewhere. New London v. Brainard, 22 Conn. 552. It is sanctioned by established principles, acted upon and recognized everywhere. The citizen may not be able to protect himself in any other way. If this is not his remedy, he has none. The money drawn from him by taxation may be squandered by unlawful donations to forward all manner of visionary schemes; other contributions may be wrung from him from year to year, and wasted in the same way, in defiance of laws carefully framed for his protection, and he would nevertheless be helpless. A more proper case for injunction can not be well conceived than that in which a tax payer seeks to protect from lawless waste a public fund, which, when dissipated thus, the law will with strong hand compel him to replenish. See Gifford v. N. J. R. R. Co., 2 Stockt. 171."

[1] Graham v. Horton, 6 Kan. 343.

[2] Gall v. Cincinnati, 18 Ohio St. 563.

IV. Public Officers.

§ 796. General rule.
797. Equity will not review action of inferior tribunals.
798. Will not decide right to hold office.
799. Applications of the rule.
800. Effect of the writ.
801. Possible remedy at law no bar to injunction.
802. Relief where legal remedy is insufficient.
803. Continuing trespass enjoined.
804. Rule as to complainant's interest.
805. President of United States will not be enjoined from executing law of congress.
806. Injunction against agents of the government.
807. Special cases.
808. Subscriptions in aid of railway.
809. Special cases.

§ 796. The preventive jurisdiction of equity extends to the acts of public officers, and will be exercised on behalf of private citizens who sustain such injury at the hands of those claiming to act for the public, as is not susceptible of reparation in the ordinary course of proceedings at law. And it may be stated as a general rule, that where public officers, under color and claim of right, are proceeding to impair either public or private rights, or where their proceedings will result in serious injury to private citizens, without any corresponding benefit to the public, or where the aid of equity is necessary to prevent a multiplicity of suits, an injunction will be allowed.[1] Thus, commissioners acting under color of law, and proceeding without any real legal authority to permanently appropriate the land of a private citizen to a purpose connected with a work of internal improvement, may be enjoined from proceeding with such appropriation. And in such a case it is no answer to say that the land, independent of the

[1] Green v. Green, 34 Ill. 320; Mohawk etc. v. Artcher, 6 Paige, 83; Oakley v. Trustees etc., Ib. 262. And see Green v. Oakes, 17 Ill. 249, and cases cited.

use to which it is to be put in making the improvement, would be of little value, or that the injury to the owner would be trivial by allowing the work to proceed.[1]

§ 797. Equity will not interfere by injunction for the purpose of controlling the action of public officers constituting inferior *quasi* judicial tribunals, such as boards of supervisors, commissioners of highways, and the like, on matters properly pertaining to their jurisdiction, nor will it review and correct errors in the proceedings of such officers, the proper remedy, if any, being at law, by writ of *certiorari*.[2] So where commissioners of roads and highways are by law entrusted with full jurisdiction over matters pertaining to changes in the roads, a court of equity will not interfere with the exercise of their discretion, unless a strong case of fraud or irreparable injury be shown. And where they have exercised their discretion and made their decision in good faith, and without any intention of oppressing or injuring private persons, an injunction will not be allowed against their action.[3] But a ministerial officer, whose rights and powers are conferred by statute upon certain conditions, may be enjoined from acting contrary to authority, if his acts are likely to result in public injury, such a case being distinguishable from that of a municipal corporation exercising legislative functions or discretionary powers.[4]

[1] McArthur *v.* Kelley, 5 Ohio, 189; Morehead *v.* Little Miami etc., 17 Ohio, 340; Anderson *v.* Commissioners etc., 12 Ohio St. 635.

[2] Mooers *v.* Smedley, 6 Johns. Ch. 28; Mayor etc. *v.* Meserole, 26 Wend. 132; Van Doren *v.* Mayor etc., 9 Paige, 388; Livingston *v.* Hollenbeck, 4 Barb. 10; Bouton *v.* Brooklyn, 15 Barb. 375; Gillespie *v.* Broas, 23 Barb. 370; Hyatt *v.* Bates, 40 N. Y. 164. In Mooers *v.* Smedley, 6 Johns. Ch. 28, Kent, Chancellor, observes: "I can not find by any statute, or precedent, or practice, that it belongs to the jurisdiction of chancery, as a court of equity, to review or control the determination of the supervisors in their examination and allowance of accounts and causing the money to be raised, * * the review and correction of all errors, mistakes and abuses in the exercise of the powers of subordinate public jurisdictions and in the official acts of public officers, belongs to the supreme court. * * * It has always been a matter of legal and never a matter of equitable cognizance."

[3] Warfel *v.* Cochran, 34 Pa. St. 381.

[4] Lane *v.* Schomp, 5 C. E. Green, 82.

§ 798. A court of equity is not the proper tribunal for determining disputed questions concerning the appointment of public officers, or their right to hold office, such questions being purely of a legal nature, and cognizable only by courts of law. Thus, equity will not interfere by injunction to restrain persons from exercising the functions of public offices, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum. And a temporary injunction granted *pendente lite*, and until the question of the validity of the law under which defendants claim their offices can be determined, will be dissolved.[1]

§ 799. Where a specific remedy by *quo warranto* exists at law for the unlawful usurpation of an office by one not entitled thereto, a court of equity will not entertain jurisdiction of the offense, and will not grant an injunction against the incumbent

[1] The People etc. *v.* Draper, 24 Barb. 265. This was an action brought by the attorney general on behalf of the people, to determine the rights of defendants to the offices of police commissioners of the city of New York, plaintiffs relying on the invalidity of the law under which defendants derived their appointment. A temporary injunction having been granted restraining the defendants, *pendente lite*, from exercising any of the functions of their offices, it was dissolved on the ground that the case was not one demanding equitable relief. Peabody, J., says: "I am inclined to think that such relief has not been deemed consistent with the interest of the state, with enlightened public policy, or with the general principles which must govern as to an office emanating from the sovereign power, and that hence it has never been adopted in practice; that the public welfare has been deemed to require that an actual incumbent of an office should not be forbidden to perform the duties of it for the time being, even though his title to the office were doubtful; that the public should not be deprived of the benefit of an office merely because it was uncertain whether the person in and ready to perform the duties of it were there rightfully, even while the title of the party assuming to act should be in controversy. To restrain the action of the incumbent is to restrain all the functions of the office; for he being in—even if wrongfully—no one else can enter until he is removed, and he must act, or no one can. And it is not at all difficult to see that in very many and most cases, the public interest would require that the duties of an office should not be suspended, and its functions cease, until the matter of personal right between rival claimants could be determined."

of the office.[1] Especially will the court refuse to interfere where the answer fully denies the equity of the bill, and shows satisfactorily that defendant has a legal right to the office in question.[2] Nor will the right to an office in an incorporated company be tried upon an application for an injunction; nor will one who has been wrongfully removed from such an office be restored by injunction.[3] Where, however, two different bodies are attempting, under claim of right, to act as the common council of a city, a preliminary injunction may be granted, on the ground that the acts in question are contrary to law and prejudicial to the interests of the community, and because no adequate remedy can be had at law.[4]

§ 800. The effect of an injunction restraining a public officer from doing an official act, is to protect him from proceedings at law to compel the doing of the act enjoined. Thus, where a town treasurer is restrained by injunction from paying over certain moneys collected by him in his official capacity, a writ of *mandamus* will not lie to compel him to make the payment.[5]

§ 801. The fact that persons injured by the acts of public officers have a possible remedy at law, will not deprive them of relief in equity. And where public officers are proceeding illegally and improperly, under color and claim of right, to open a private road across the works of a railway company, an injunction may be granted, although complainants might have lain by until the road was completed, and then recovered damages at law for injuries sustained, equitable relief being granted in such case on the ground of preventing a multiplicity of suits.[6]

[1] Hagner v. Heyberger, 7 Watts & S. 104; Updegraff v. Crans, 47 Pa. St. 103. It is to be observed that the equity powers of the courts in the State of Pennsylvania, are defined by statute as extending to the prevention of acts contrary to law.

[2] Maryland v. Jarrett, 17 Md. 309.

[3] Sherman v. Clark, 4 Nev. 138.

[4] Kerr v. Trego, 47 Pa. St. 292.

[5] State v. Kispert, 21 Wis. 387.

[6] Mohawk etc. v. Artcher, 6 Paige, 83. And see Belknap v. Belknap, 2 Johns. Ch. 463; Livingston v. Livingston, 6 Johns. Ch. 497.

§ 802. Where commissioners, appointed under an act of legislature for the purpose of creating a new county, are proceeding in violation of the constitution of the state, their proceedings may be perpetually enjoined, notwithstanding the common law remedy by *quo warranto*, since the legal remedy would be manifestly inadequate to meet the necessities of such a case.[1] The interposition of equity under such circumstances, is based upon the doctrine of *quia timet* and the necessity of preventing irreparable mischief.[2] If, however, the county has been fully organized and put into operation under the act of the legislature establishing it, a court of chancery has no power to abolish it, or to restrain its officers from performing their functions.[3]

§ 803. Where inspectors, appointed in pursuance of a law of the state for the drainage of swamp lands, exceed their powers, thereby causing injury to neighboring mill owners in the enjoyment of the water for their mills, an injunction may be allowed, even though an action of trespass would lie, since the case is not one of an ordinary trespass, but the injury is continuing in its nature, and the interposition of equity is needed to prevent permanent mischief and a multiplicity of suits.[4]

§ 804. He who seeks to restrain improper or unlawful conduct on the part of public officers, must allege sufficient facts to show that he has such an interest in the public welfare as to make him a proper party to prevent the commission of a public wrong. It will generally suffice that the persons seeking the injunction are residents and tax payers. Thus, it is held that complainants, who are voters and tax payers in a county, are proper parties to enjoin unauthorized expenditures of county funds by a county judge.[5] But an injunction will not be granted to restrain county officers from removing their offices to another location, at the suit of one who does not

[1] Bradley v. Commissioners, 2 Humph. 428.
[2] Id.
[3] Ford v. Farmer, 9 Humph. 152.
[4] Belknap v. Belknap, 2 Johns. Ch. 463.
[5] Rice v. Smith, 9 Iowa, 570.

show himself to be a resident and voter of the county, and who shows no interest in the result of the controversy.[1]

§ 805. A bill for an injunction will not lie against the President of the United States, to prevent him from executing a law of congress, on the ground of its unconstitutionality, since the judicial department of the government has no power to interfere with the executive in the performance of his official duties.[2] Nor will a bill of such a nature be entertained in a court of equity because it describes the president as a citizen of a state.[3]

§ 806. An injunction will not be granted on behalf of a riparian owner to restrain the agents of the government from making alterations in a navigable stream, where the alleged injury is mere matter of opinion, and is denied by defendants.[4] But it would seem that where congress entrusts an appropriation for public improvements to one of the departments, which in turn employs agents to do the work, this department and its agents may be enjoined from doing the work in an improper manner, although an injunction would not lie against the United States.[5]

§ 807. Public officers, acting under authority of a state, will not be restrained from taking private property for works of public improvement until suitable compensation is made for the property taken, where a mode is provided by law for the assessment of the damages sustained.[6] Nor will equity lend its aid to enjoin a sheriff from proceeding under process of the court, where the injunction is sought merely to aid complainant in a proceeding at law which is unwarranted and oppressive.[7]

[1] Henderson v. Marcell, 1 Kan. 137.
[2] Mississippi v. Johnson, 4 Wal. 475.
[3] Id.
[4] Avery v. Fox, 1 Abb. U. S. R. 246.
[5] Id.
[6] Heston v. Canal Commissioners, Brightly, 133.
[7] Haight v. Executors etc., 2 Green Ch. 386. "I can not," says Vroom, Chancellor, in this case, "restrain a public officer acting under the writ of this court, for the purpose of aiding the complainants in what I consider an unlawful proceeding in a court of law."

§ 808. Where town officers are about to deliver to a railway company the bonds of the town, issued in aid of the railway, and are proceeding in violation of the conditions of subscription, they may be perpetually enjoined, on the ground that if the bonds should be negotiated the town might be embarrassed in defending against them at law.[1] But a tax payer of a town which has issued bonds in aid of a railway, can not enjoin the transfer or delivery of the bonds to the officers of the company on the ground that they were not legally elected, they being officers *de facto* of the company.[2]

§ 809. Commissioners for the drainage of swamp lands, appointed under an act of legislature held to be unconstitutional and void, may be enjoined from proceeding under the act by the owners of land aggrieved thereby.[3] And where a town has voted to loan its surplus revenue in an illegal and unauthorized manner, a court of equity may properly enjoin the trustees from complying with such vote.[4] So an injunction has been allowed to restrain the trustees of a church from leasing the church property for school purposes, contrary to the terms of the grant.[5]

[1] Danville *v.* Montpelier etc., 43 Vt. 144.
[2] Sauerhering *v.* Iron Ridge etc., 25 Wis. 447.
[3] Hartwell *v.* Armstrong, 19 Barb. 166.
[4] Pope *v.* Halifax etc., 12 Cush. 411.
[5] Perry *v.* McEwen, 22 Ind. 440.

V. PARTNERS.

§ 810. General rule and illustrations thereof.
811. Mere temptation to dishonesty no ground for relief.
812. Publication of partnership letters, when enjoined.
813. Violation of partnership articles enjoined.
814. Judgments against individual partners.
815. Exclusion of partner from the business.
816. Partner may be restrained from improper interference with the business.
817. Regard will be had to the nature of the business and scope of partner's authority.
818. Agreements by retiring partners not to carry on business enforced by injunction.
819. Relief after dissolution.
820. Effect of statute.
821. Fraudulent disposal of partnership property will be enjoined.
822. Use of firm name.
823. Special cases.
824. Receivers.
825. Receivers.
826. Effect of appointment or removal of receiver upon injunction.

§ 810. Courts of equity will entertain jurisdiction to prevent by injunction members of a copartnership from the commission of acts inconsistent with the terms of their agreement, and from violating the rights of their copartners. The jurisdiction is founded upon well-established principles of equity, and is exercised irrespective of whether a dissolution of the partnership is sought.[1] Thus, where several partners are engaged in trade, one of their number may be enjoined from

[1] Cropper v. Coburn, 2 Curtis, 465; Marble Company v. Ripley, 10 Wal. 339; Miles v. Thomas, 9 Sim. 606; Fairthorne v. Weston, 3 Hare, 387. In the latter case it was said by Wigram, Vice Chancellor, that, "If that were the rule of the court, if a bill would in no case lie to compel a man to observe the covenants of a partnership deed, unless the bill seeks a dissolution of the partnership, it is obvious that a person fraudulently inclined might, of his own mere will and pleasure, compel his copartner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract."

using force to the obstruction or interruption of the trade, and from removing or displacing servants employed by the other partners, and from removing the books and papers relating to the business.[1] And where one of the members of a firm has been temporarily insane, and on his recovery his copartners exclude him from the management of the firm business, an injunction will be allowed to restrain them from thus excluding him from the business.[2] So where a partnership is formed for a term of years, to be terminated on notice by either party for a given length of time, an injunction will be granted to prevent one partner from obstructing the other in the enjoyment of his partnership rights, and from any improper use of the partnership funds or effects.[3]

§ 811. Mere temptation to dishonesty and to the abuse or improper use of partnership property, will not of itself induce a court of equity to interfere. And where all the partners save one engaged in the publication of a newspaper, are also partners in a rival publication, an injunction will not be granted to restrain one of the papers from using the material of the other under a contract which has been long acted on.[4] But an injunction is proper in such a case to prevent one of the papers from publishing any information obtained exclusively at the expense of the other, until published in the paper thus obtaining it.[5]

§ 812. One member of a copartnership may be enjoined, after a dissolution of the firm, from publishing letters received from his copartner, which were written and received in the course of their partnership business and pertained to that business, where the purposes of justice do not require the publication. The interference of the court in such case is based upon the principle that the writer of a letter does not transfer the absolute property in or ownership of the letter to the person receiving it, who is only authorized to use it for

[1] Brewers' Case, 19 Ves., second English edition, note to page 148.
[2] Anonymous, 2 Kay & J. 441.
[3] Hall v. Hall, 12 Beav. 414.
[4] Glassington v. Thwaites, 1 Sim. & St. 124.
[5] Id.

the purpose for which it was sent, the ownership of the letter still remaining in the writer.[1]

§ 813. Where a partnership is formed for a given period, a member of the firm may be enjoined from withdrawing and entering upon a new partnership before the expiration of that period, and the new partners may also be enjoined from carrying on business with such partner, or otherwise, in the name of the original firm, and from receiving letters addressed to such firm.[2] And where, in violation of his partnership articles, one of the proprietors of a theater engages in writing plays for another theater, an injunction may properly be allowed.[3]

§ 814. Where, under a judgment at law against one member of a copartnership for his individual debt, his interest in the firm property has been levied upon, a court of equity will not enjoin the proceedings until the partnership accounts have been liquidated. Such a proceeding would inevitably cause great delay and embarrassment to the individual creditors, and equity will not lend its aid to thus impede a creditor in the enforcement of his just demand.[4] And a creditor of the firm, who has not yet reduced his claim to judgment, has no such *quasi* lien upon the partnership property as to entitle him to the aid of equity to restrain a

[1] Roberts *v.* McKee, 29 Geo. 161. And see Gee *v.* Pritchard, 2 Swans. 403.

[2] England *v.* Carling, 8 Beav. 129.

[3] Morris *v.* Colman, 18 Ves. 437.

[4] Moody *v.* Payne, 2 Johns. Ch. 548. The rule as laid down in the text is sustained by no less an authority than Chancellor Kent, who observes in Moody *v.* Payne: "I do not know that this court has ever undertaken to stop an execution at law, in such a case, until the partnership accounts have been taken, and it would be too much for me to assume it without precedent. The principle would go to stay executions at law, in every case, against the partnership property of one partner who owed separate debts, until the disclosure and liquidation of the concerns of the copartnership. This would produce inconceivable delay and embarrassment in respect to separate creditors." But see Place *v.* Sweetzer, 16 Ohio, 142, and Sutcliffe *v.* Dohrman, 18 Ohio, 181, where it is held that when an execution has been levied upon partnership property to satisfy the individual debt of a member of the firm, the sale of the property may be restrained until the interest of the partner is ascertained.

judgment creditor of an individual member of the firm from satisfying his judgment out of the firm property. The rule is deducible from the general principle that a creditor at large, or before judgment, is not entitled to the interference of a court of equity to prevent his debtor from disposing of his property, but must first reduce his claim to judgment.[1]

§ 815. The exclusion of one partner from the premises where the firm business is being conducted, and preventing him from participation in the business, constitutes sufficient cause to warrant a court of equity in restraining the remaining partners from receiving and collecting debts due the firm.[2] But where one member of a firm has been enjoined from intermeddling with the partnership assets and effects, he is not guilty of a breach of the injunction in giving authority to an attorney to confess judgment for a debt due to a creditor of the firm, for the purpose of enabling such creditor to obtain a priority over other creditors by levying on the partnership assets.[3]

§ 816. In an action for a dissolution of a partnership the court may, upon proper showing, restrain any member of the firm from improper interference with the business, or from committing any damage to the property of the firm.[4] Thus, one member may be enjoined from collecting any debts due the copartnership, or from accepting or negotiating bills of exchange for other than partnership purposes.[5] And the court may even restrain one partner from using the firm name in any manner in drawing or indorsing commercial paper, or in accepting bills of exchange.[6] And where, upon a dissolution, one of the partners takes all the property and assets, agreeing to pay all the debts, and to hold the other partner

[1] Young v. Frier, 1 Stockt. 465; Mittnight v. Smith, 2 C. E. Green, 259.

[2] Wolbert v. Harris, 3 Halst. Ch. 605.

[3] McCredie v. Senior, 4 Paige, 378.

[4] Crockford v. Alexander, 15 Ves. 138; Smith v. Jeyes, 4 Beav 503; Marshall v. Watson, 25 Beav. 501.

[5] Read v. Bowers, 4 Bro. C. C. 441; Williams v. Bingley, 2 Vern. 278, note.

[6] Jervis v. White, 7 Ves. 413; Hood v. Aston, 1 Russ. 412.

harmless on account thereof, but afterward becomes insolvent and threatens to dispose of the property for his own benefit, leaving the debts unpaid, he may be enjoined at the suit of the creditors from doing the acts threatened.[1]

§ 817. In granting or withholding relief by injunction in cases arising between partners, the courts will look to the nature of the business in which the firm is engaged, and regard will be had to the scope of the authority of the partners as confined to that particular business. And where the object of a firm is not the buying and selling of goods, but the conducting a newspaper, to which the continued ownership of the partnership property is indispensable, an attempt by one partner to sell the entire property of the firm will be enjoined, such an act not being properly within the scope of the partner's authority.[2]

§ 818. Agreements by one or more of the retiring members, on the dissolution of a firm, not to carry on the firm business, may be enforced in equity by enjoining any attempt at their violation. Such agreements are not to be construed as in restraint of trade generally, nor are they in contravention of public policy, and there being no adequate remedy at law for their violation, a court of equity is the proper tribunal to afford relief.[3] Thus, where one of several partners engaged in the carrying trade, purchases the interest of all the others in the assets and good will of the business, they agreeing in writing not to do anything which will impair or injure the good will of the trade, equity will enjoin them from taking any steps tending to draw away the business to themselves. In such a case, the injury being a constantly recurring one, the damages sustained are not susceptible of accurate computation, and an action at law would afford no adequate redress for the loss sustained.[4]

§ 819. While the objections to the interference of equity by injunction in partnership cases are less strong after

[1] Deveau v. Fowler, 2 Paige, 400.
[2] Sloan v. Moore, 37 Pa. St. 217.
[3] Angier v. Webber, 14 Allen, 211; Whittaker v. Howe, 3 Beav. 383.
[4] Angier v. Webber, 14 Allen, 211.

dissolution than before, yet even then some urgent and pressing necessity must be shown to induce the court to sustain an injunction. And where the partner against whom the writ has been granted has the legal right to the partnership property, in accordance with the terms of the contract of dissolution, an injunction will not be sustained to restrain him from the management of the property, the bill containing no allegations of his insolvency.[1]

§ 820. While, as we have already seen, a creditor at large whose claim has not been established by judgment, will not be allowed to interfere with the disposition either of his debtor's partnership or individual property, the rule may be varied by statute. And under a statute authorizing a creditor to vacate any conveyance or contract made by the debtor which is fraudulent as against creditors, without first reducing his claim to judgment, the creditor may rightfully enjoin a fraudulent assignment of the effects of a copartnership.[2] But an injunction in such case, while it will embrace all the partnership property included in the fraudulent assignment or transfer, will not affect the separate property held *bona fide* by individual members of the firm, and not claimed by them under any fraudulent transfer of property originally owned by the copartnership.[3]

§ 821. A member of a partnership who holds notes for the benefit of the firm, and attempts to pledge or pawn them for his own private debts, is guilty of such fraudulent misappropriation as will be restrained by a court of equity.[4] So, too, if one partner attempts to dispose of specific chattels belonging to the firm, pending litigation for the adjustment of the partnership affairs, he may be enjoined.[5] And if one partner brings an action at law against another, where, having regard

[1] O'Bryan *v.* Gibbons, 2 Md. Ch. 9. And see Drury *v.* Roberts, Ib. 157.

[2] Sanderson *v.* Stockdale, 11 Md. 563.

[3] Id.

[4] Stockdale *v.* Ullery, 37 Pa. St. 486. And this under a statute authorizing injunctions to restrain acts "contrary to law," the court holding that acts contrary to equity were within the purview of the statute and should be enjoined accordingly.

[5] Ellis *v.* Commander, 1 Strob. Eq. 188.

to the state of the partnership business and accounts, such action should not be brought, an injunction may be granted.[1] So where one partner sells to the other his entire interest in the partnership property, with an implied warranty of title, a subsequent levy upon and sale of the property by creditors of the firm, is such a failure of consideration as will warrant a court of equity in entertaining a bill, on behalf of the sureties of the purchaser, to enjoin proceedings at law for the purchase money.[2]

§ 822. The right to use the firm name may be regarded as one of the partnership assets, and if upon a dissolution one member of a firm purchases the entire business, the name is regarded as passing with the other assets, and the retiring partner may be restrained from its use.[3] And a surviving partner having the right to use the firm name of the partnership may, if he has not abandoned the right, restrain the executor of the deceased partner from using the name for his own benefit.[4]

§ 823. An injunction has been allowed to restrain one person from representing another to be his partner and holding him out to the world as such, without his consent or authority.[5] But equity will not interfere to prevent a partner from acting in that capacity, merely because public confidence in the firm might be shaken if it were known that such person was a partner.[6] And where an injunction has been allowed to restrain one partner from interfering with another's rights as a member of the firm, it will be dissolved on the coming in of the answer showing that the partnership has been dissolved by mutual consent.[7]

§ 824. The appointment of receivers in partnership cases depends largely upon the special circumstances of each partic-

[1] Gold *v.* Canham, 1 Ch. Cas. 311.
[2] Hough *v.* Chaffin, 4 Sneed, Tenn. 238.
[3] Banks *v.* Gibson, 34 Beav. 566.
[4] Lewis *v.* Langdon, 7 Sim. 422.
[5] Routh *v.* Webster, 10 Beav. 561.
[6] Anonymous, 2 Kay & J. 441.
[7] Van Kuren *v.* Trenton etc., 2 Beas. 302.

ular case, and it is difficult to lay down any rules of general application. It does not necessarily follow because a partnership has been dissolved and because a partner is entitled to an account, that he is therefore entitled to an injunction and a receiver; but there must be some actual abuse of the rights of a copartner, or of the partnership property, before a court of equity will interfere.[1] And in the case of a dissolution by the sale of the interest of one partner under an execution against him individually, the court will be governed by the same rule, in interfering with the other partner, as in case of a dissolution by death; and the injunction will not be allowed if the equities do not clearly warrant it.[2]

§ 825. Upon a bill between partners for a settlement of the affairs of the partnership, after a dissolution, the insolvency of the defendant will warrant the court in granting an injunction and appointing a receiver for the protection of complainant. The insecurity of the partnership assets in such a case, if left in the control of an insolvent member of the dissolved firm, affords strong ground for equitable relief.[3] And where, through the improper conduct of one of two partners, such a want of confidence exists between them as is sufficient to warrant the court in dissolving the partnership, a receiver may be appointed and an injunction allowed, the injunction in such case following the receiver almost as a matter of course.[4]

§ 826. The continuance of an injunction granted to preserve partnership property from waste, pending an application for the appointment of a receiver, must depend upon the fate of such application, and if the receiver is denied, the injunction must be dissolved.[5] But the injunction being regarded as auxiliary to the appointment of a receiver, upon the removal of the receiver and the appointment of another, the injunction originally allowed will be continued as of course.[6]

[1] Renton v. Chaplain, 1 Stockt. 62.
[2] Id.
[3] Randall v. Morrell, 2 C. E. Green, 343.
[4] Seighortner v. Weissenborn, 5 C. E. Green, 172.
[5] Walker v. House, 4 Md. Ch. 39.
[6] Williamson v. Wilson, 1 Bland. 418.

VI. Executors and Administrators.

§ 827. Jurisdiction generally exercised for protection of estate.
828. Improper distribution of estate enjoined.
829. Defective execution of powers of administrator a ground for injunction.
830. Judgment against administrator, when enjoined.
831. Special cases.

§ 827. The granting of injunctions for or against executors and administrators, is based upon principles of a purely equitable nature, and the jurisdiction is generally exercised for the protection of the estate to be administered, though it may, as we shall hereafter see, be allowed for the protection of the executor or administrator personally. It may be said generally, that proceedings by an administrator without due and sufficient authority may be enjoined at the suit of the next of kin. Thus, where an administrator is proceeding without proper authority to sell the effects of his intestate, an injunction is the proper remedy.[1]

§ 828. Where the executors of a decedent refuse to distribute the estate ratably among the creditors, according to the terms of the devise, and threaten to secure certain favored creditors who are entitled to no preference, either at law or in equity, an injunction may be allowed to prevent them from making such a disposition of the estate.[2] And where a nonresident and insolvent executor is seeking by suit in the common law courts to obtain possession of a fund belonging to the estate, he may be enjoined from proceeding with his suit, upon a strong showing of danger of his wasting or misapplying the fund.[3] But it is to be observed that insolvency of the executors is not of itself sufficient cause to warrant a court of equity in restraining them from a sale of the property,

[1] Lawrence v. Philpot, 27 Geo. 585.
[2] Depau v. Moses, 3 Johns. Ch. 349.
[3] Dougherty v. Walker, 15 Geo. 442.

and thereby taking the administration of the estate out of their hands.[1]

§ 829. The defective execution of the powers conferred upon administrators, constitutes ground for relief in equity in favor of *bona fide* purchasers for valuable consideration. Thus, the heirs of a deceased person may be enjoined from prosecuting an action of ejectment for the recovery of real estate sold by the administrators of the estate, the only foundation for the action being the omission of one of the two administrators to join in the conveyance. The sale having been consummated and the purchase money paid in good faith, the purchaser is entitled to the aid of equity to relieve against the defective conveyance.[2]

§ 830. An injunction has been allowed on behalf of an administrator to restrain the enforcement of a judgment against him, where, subsequent to the rendering of the judgment, he has discovered set-offs and credits to which his intestate was entitled, but of which the administrator was ignorant when the judgment was obtained.[3] And where, on the application of an administrator, an injunction has been allowed to restrain a judgment recovered against him in his capacity of administrator, it may be continued until such time as sufficient assets shall come into his hands to satisfy the judgment, or any part thereof, reserving to the judgment creditor the right to show such assets by *sci. fa.*[4]

§ 831. An executor who has rendered himself personally liable at law, will not be protected in equity against a judgment at law for such liability.[5] Courts of equity will not, however, permit their own decrees to be interfered with, and to prevent this they will, under proper circumstances, exercise their undoubted jurisdiction by injunction for their own protection.[6] Thus, a decree requiring an administrator to render

[1] Schanck *v.* Executors of Schanck, 3 Halst. Ch. 140.
[2] Wortman *v.* Skinner, 1 Beas. 358.
[3] Terril's Adm'rs. *v.* Southall's Ex'r., 3 Bibb, 458.
[4] Haydon *v.* Goode, 4 Hen. & Munf. 460.
[5] Burles *v.* Popplewell, 10 Sim. 383.
[6] Brooks *v.* Dent, 4 Md. Ch. 473; Burles *v.* Popplewell, 10 Sim. 383.

an account, will be protected by injunction; and such a decree being for the benefit of all the creditors, and in the nature of a judgment for them all, the relief will be allowed on the application of either party to restrain proceedings at law by any of the creditors against the administrator, instituted after the date of the decree.[1]

VII. Sureties.

§ 832. General rule and its applications.
833. Foundation for the rule.
834. Application of the rule to an accommodation indorser.
835. Limitation upon the rule.
836. Insolvency of principal debtor a ground of relief.
837. Effect of statute.
838. Special cases.

§ 832. The appropriate remedy for the protection of sureties, who have been discharged from their liabilities, is by injunction to restrain proceedings at law against them on account of the suretyship.[2] And it is a rule of general application, that wherever the relation of the surety to the debtor is changed without his consent, as by giving the principal debtor an extension of the time of payment, unknown to the surety, the latter is thereby discharged in equity, and may perpetually enjoin the creditors from proceeding at law against him for the collection of the debt.[3] Thus, a creditor who enters into an agreement with his principal debtor for forbearance to sue, thereby discharges the sureties of the debtor, and if he proceeds to obtain a judgment against the sureties before they have been notified of the contract of forbearance, the judgment

[1] Brooks v. Dent, 4 Md. Ch. 478. And see Thompson v. Brown, 4 Johns. Ch. 619.

[2] Samuell v. Howarth, 3 Meriv. 272; Allan v. Inman, 7 Jur. 433.

[3] Clarke v. Henty, 3 Y. & C. 187; Armistead v. Ward, 2 Pat. & H. 504; Rees v. Berrington, 2 Ves. Jr. 540; Boultbee v. Stubbs, 18 Ves. 20. And see King v. Baldwin, 2 Johns. Ch. 554.

will be perpetually enjoined on the application of the sureties.[1] So if the creditor fraudulently aids the principal debtor in absconding, with intent thereby to hinder the surety in his remedy against the principal, the creditor will be enjoined from collecting his debt of the surety.[2]

§ 833. The rule as above stated is founded in the plainest principles of equity and reason. The surety has the right to insist on a strict performance of the contract to which he has become a party, and he can not be bound by any obligation to which he has not given his consent.[3] A binding and valid contract of forbearance, made by the creditor with his debtor, without the surety's consent, by depriving the surety of the right of immediate recourse against his principal debtor, takes away from him the protection to which he is entitled, and deprives him of the equity which he has the right to demand.[4] Nor does the fact that the contract for indulgence is clearly for the benefit of the surety vary the application of the rule, since the surety himself is the proper person to determine whether he is to be benefited thereby.[5]

§ 834. Upon the principles above laid down, the protection of equity has been extended to the case of an accommodation indorser standing in the position of a surety. Thus, where the makers of a promissory note, in a suit prosecuted to a court of final resort, are held not liable, on the ground of illegality of consideration, an indorser for accommodation will be allowed to enjoin a judgment obtained against him on the same note, on the ground that the principal being discharged, the surety should also be discharged, even though he has not used due diligence in defending against the action at law.[6]

§ 835. The rule is to be understood as limited to cases

[1] Armistead v. Ward, 2 Pat. & H. 504.

[2] Smith v. Hays, 1 Jones Eq. 321.

[3] Samuell v. Howarth, 3 Meriv. 272; Bonser v. Cox, 13 L. J. Ch. 260; Newton v. Chorlton, 10 Hare, 649.

[4] Rees v. Berrington, 2 Ves. Jr. 540; Boultbee v. Stubbs, 18 Ves. 20; Newton v. Chorlton, 10 Hare, 649.

[5] 2 Story's Eq. § 883; Samuell v. Howarth, 3 Meriv. 272; Calvert v. London etc., 2 Keen, 638.

[6] Miller v. Gaskins, Sm. & M. Ch. 534.

where the agreement for forbearance is founded upon sufficient consideration, and is in its nature such an agreement as the debtor might enforce against the creditor.[1] And where a surety has entered into a bond for the performance by his principal of two separate things, a subsequent variation from the terms of the contract as to one of those things, without the surety's consent, does not release him from his obligation as to the other.[2] Nor will the taking of additional security from the debtor operate as a discharge of the surety, unless taken in place of the original security.[3]

§ 836. Insolvency of the principal debtor, against whom a judgment has been obtained, and the fact of his having, after the rendition of the judgment, sold property which the purchaser is about to remove from the county, afford sufficient ground for enjoining the removal of the property at the suit of the surety, even though he has not yet been compelled to pay the judgment.[4] So sureties upon an official bond, upon showing that their principal will be in default, and that property mortgaged to them to secure them on account of their suretyship, is in danger of being removed, are entitled to the aid of equity to restrain the removal of the mortgaged property.[5]

§ 837. An injunction granted for the purpose of protecting a person from the sale of his property, to satisfy a debt for which he was simply a surety, will not be dissolved because of a statute conferring upon the court out of which the execution issued power to administer equitable relief, where a judgment is recovered both against principal and surety. The court will be governed in such a case by the principle that the conferring of equitable power upon courts of common law, neither impairs or abridges the jurisdiction of equity, but simply creates a case of concurrent jurisdiction.[6]

[1] Blake v. White, 1 Y. & C. 420; Armistead v. Ward, 2 Pat. & H. 504; Keath v. Key, 1 Y. & J. 434.

[2] Harrison v. Seymour, 1 L. R. C. P. 519.

[3] Eyre v. Everett, 2 Russ. 381; Newton v. Chorlton, 10 Hare, 649.

[4] Anderson v. Walton, 35 Geo. 202.

[5] Outlaw v. Reddick, 11 Geo. 669.

[6] Irick v. Black, 2 C. E. Green, 189.

§ 838. A surety in a replevin bond is not entitled to an injunction to prevent the levy of an execution on his own property until that of his principal debtor shall have first been levied upon. The protection of the surety's property by compelling a levy on that of the principal, is a proceeding unsanctioned either by principle or authority.[1] Nor can a surety, by injunction, arrest proceedings at law against him by his co-surety for contribution, unless he tenders the principal and interest due the co-surety who has paid the debt.[2]

VIII. Husband and Wife.

§ 839. Injunction allowed to protect married woman in her separate property.
840. Relief not allowed where part of purchase money proceeds from husband.
841. Writ allowed in aid of a bill to have wife's debts declared a lien on her separate estate.
842. Special cases.
843. Injunction in aid of proceedings for divorce.
844. Mere apprehensions of desertion by husband will not authorise injunction.
845. Husband will be restrained from encumbering property pending action for divorce.
846. Special cases.

§ 839. An injunction is the proper remedy for the protection of a married woman in the enjoyment of her separate property, as against the husband or his creditors, and courts of equity will not hesitate to extend relief in such cases.[3] And where property is settled upon the wife before marriage, as her separate and individual property, in trust for her sole use and benefit, she is entitled to the aid of equity to restrain her husband from interfering with such property.[4] And a

[1] Kilpatrick v. Tunstall, 5 J. J. Marsh. 80.
[2] Craig v. Ankeney, 4 Gill, 225.
[3] Green v. Green, 5 Hare, 399, note b; Johnson v. Vail, 1 McCart. 423.
[4] Green v. Green, 5 Hare, 399, note b.

creditor of the husband will be enjoined from selling the proceeds of the wife's real estate in satisfaction of his debt against the husband, although such proceeds have been raised by the labor of the wife and the minor children of the husband.[1] And the fact that in such a case the husband has not been joined as a defendant in the bill, will not warrant a dissolution, but leave will be given to amend.[2]

§ 840. While equity extends its protection to the separate estate of the wife, as against creditors of the husband, yet if the legal title to the property levied upon be in the husband, who has himself furnished a portion of the purchase money, the court will not interfere. Thus, where the wife has negotiated for the purchase of certain real estate, but the conveyance is made to the husband, he paying a portion of the purchase money, and she the remainder from her own earnings, no such trust results to the wife as entitles her to an injunction to restrain a judgment creditor of the husband from satisfying his judgment out of the land in question.[3]

§ 841. Though it is a general and well-established rule that courts of equity will not, at the suit of a general creditor, whose claim is not yet reduced to judgment, restrain a debtor from such disposition of his property as he may see fit to make, yet upon a bill filed against husband and wife to have certain debts contracted by the wife declared a lien upon her separate estate, defendants may be enjoined from conveying or encumbering such estate. The relief is granted in such a case upon the ground that the wife's separate property is considered in equity as charged with all debts contracted by her with reference, express or implied, to payment out of such property, and if a bill will lie to make such debts a charge upon the wife's estate, equity may properly prevent the alienation or incumbering of the estate until the relief sought by the bill can be obtained.[4]

§ 842. Where by statute the wife's real estate is expressly

[1] Johnson v. Vail, 1 McCart. 423.
[2] Id.
[3] Skillman v. Skillman, 2 McCart. 479.
[4] Oakley v. Pound, 1 McCart. 178.

exempted from sale under execution by creditors of the husband, an injunction is the proper remedy for the protection of the property against such sale, and it is error to dismiss a bill filed by the wife for this purpose.[1] But a court of equity will not entertain jurisdiction to restrain the husband, upon the application of the wife, from obtaining possession of her separate estate, where he has not instituted proceedings in any court, either of law or of equity, to obtain control of the property.[2] Nor is the husband, while acting in the capacity of administrator of the estate of his deceased wife, and having no other interest in the premises, entitled to an injunction to prevent the sale of real estate of the wife under a trust deed.[3]

§ 843. The aid of equity by injunction is most frequently sought, as between husband and wife, in cases of application for divorce from the bonds of matrimony, and it may be stated as a general rule, that, pending proceedings for divorce, a proper case of emergency being shown, the husband may be enjoined from interfering with the custody of the children or of property in possession of the wife.[4] So the husband will be enjoined from disposing of his property in such manner as to prevent the wife from obtaining alimony, or a separate maintenance, on a bill pending for that purpose.[5] And upon a bill filed by the wife for divorce and alimony, the husband, being served with process and not appearing, may properly be enjoined from alienating his property in such way as to prevent her from obtaining alimony.[6]

§ 844. Mere apprehension of abandonment by the husband, and of failure to support the wife, is not sufficient cause to warrant the interposition of equity in restraining him from disposing of his property, since injunctions are not usually

[1] Hunter's Appeal, 40 Pa. St. 194.
[2] Parsons v. Parsons, 9 N. H. 309.
[3] Stringham v. Brown, 7 Iowa, 33.
[4] Wilson v. Wilson, Wright, Ohio, 129; Edwards v. Edwards, Ib. 308.
[5] Questel v. Questel, Wright, Ohio, 492; Johnston v. Johnston, Ib. 454; Bascom v. Bascom, Ib. 632.
[6] Ricketts v. Ricketts, 4 Gill, 105.

allowed upon mere apprehensions of future wrong.[1] And where a preliminary injunction has been allowed in such a case, it will be dissolved on the coming in of the answer denying any intention on the part of the husband to abandon his wife.[2]

§ 845. An injunction obtained by the wife against the husband, pending proceedings for divorce, will restrain him from encumbering as well as from selling his property.[3] But the wife will not be allowed in such case to restrain the husband from using his property for the support of himself and his children, nor will he be enjoined from using the tools of his trade, or from carrying on his ordinary business.[4] And on granting a decree of divorce in favor of the wife, it is improper to perpetually enjoin the husband from selling his property to insure the payment of alimony.[5]

§ 846. Where an action at law is brought against the husband's executors, to recover the price of goods sold to the wife during the lifetime of the husband, and while she was living apart from her husband upon a separate maintenance, the bill alleging that this fact was known to the tradesman when the goods were sold, a court of equity will not interfere by injunction, after verdict, since the facts alleged as the ground for equitable relief would have been a proper defense at law.[6] And where, in a deed of separation between husband and wife, the husband condones all offenses then committed, and agrees not to institute proceedings for a divorce upon any ground of complaint existing prior to the deed, an injunction will not be allowed against a divorce suit afterward instituted by the husband, who alleges that he executed the deed on the wife's assurance that she had not committed adultery, which proved to be false, since such contract may be relied upon in defense of the action for divorce.[7] But where a father, who

[1] Anshutz v. Anshutz, 1 C. E. Green, 162.
[2] Id.
[3] Vanzant v. Vanzant, 23 Ill. 536.
[4] Rose v. Rose, 11 Paige Ch. 166.
[5] Errissman v. Errissman, 25 Ill. 186.
[6] Ferrars v. Ferrars, 1 Vern. 71.
[7] Brown v. Brown, 38 L. J. Ch. 158.

has committed a criminal assault upon his infant daughter, executes an instrument giving to the wife the sole control of his children, he may be restrained from any proceedings to obtain the children from the wife's custody, and from interfering with her in their management and protection.[1] And the interference of equity will be allowed, in a proper case, to prevent the father from removing his child out of the country and beyond the jurisdiction of the court.[2] So, too, in the exercise of its jurisdiction for the care of infants, equity may by injunction restrain an infant from contracting an improper marriage, upon a bill filed for the execution of the trusts of a settlement for the benefit of the infant.[3]

[1] Swift v. Swift, 34 Beav. 266.
[2] DeManneville v. DeManneville, 10 Ves. 52.
[3] Dawson v. Thompson, 12 L. T. N. S. 178.

CHAPTER XIX.

OF THE VIOLATION OF INJUNCTIONS.

I. EFFECT OF THE WRIT AND ITS VIOLATION.
II. WHAT CONSTITUTES A VIOLATION.
III. REMEDY FOR VIOLATION.

I. EFFECT OF THE WRIT AND ITS VIOLATION.

§ 847. Injunction must be observed, however erroneous.
848. Reason for the rule.
849. Violation a contempt of court regardless of motive; motive may be considered in awarding punishment.
850. Defendant's guilt must be clearly established.
851. The fact that the breach was committed under advice of counsel no defense.
852. Injunction becomes operative from the granting of the order.
853. Defendant need not be officially apprised of writ; any actual notice sufficient to bind him.
854. Illustrations of the rule.
855. Complainant must comply with conditions on which writ is granted.

§ 847. The granting of injunctions being justly regarded as one of the highest prerogatives of courts of equity, the most exact and implicit obedience is required from those against whom the mandate of the court is directed. With whatever irregularities the proceedings may be affected, or however erroneously the court may have acted in granting the injunction in the first instance, it must be implicitly observed so long as it remains in existence, and the fact that it has been obtained erroneously affords no justification or excuse for its

violation before it has been properly dissolved.[1] And the party against whom an injunction issues will not be allowed to violate it on the ground of want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the court, or upon the equity of the bill, or to question the authority of the court to grant relief upon the facts stated, except upon application to dissolve the injunction.[2]

§ 848. The reason for the rule as here laid down, is found in the necessity of preserving the respect and obedience due to the mandates of equity, and of preventing the disastrous confusion which would inevitably result from allowing parties against whom injunctions were issued to be themselves the judges of the propriety of the relief, or the regularity of the proceedings. From the nature of the case, the tribunal granting the writ must itself be the arbiter, and its mandates are to be strictly observed until properly revoked. And if the court granting the relief had jurisdiction of the subject matter, the fact that its prerogative was erroneously exercised, does not render the injunction void, but only voidable, and until it is set aside or revoked, it is entitled to implicit obedience.[3] And the fact that the injunction was too broad in its terms, and covered property over which it should not have been extended, affords no excuse for its violation.[4]

§ 849. The violation of an injunction constitutes a contempt of the court from which it issued, and will be punished accordingly.[5] Nor does the question of the motive or intent with which the writ was disobeyed alter or vary the responsi-

[1] Moat *v.* Holbein, 2 Edw. Ch. 188; Woodward *v.* Earl of Lincoln, 3 Swans. 626; People *v.* Sturtevant, 9 N. Y. 263; Sullivan *v.* Judah, 4 Paige, 444; Richards *v.* West, 2 Green Ch. 456. And see Fennings *v.* Humphrey, 4 Beav. 1; Blake *v.* Blake, 7 Beav. 514; Chuck *v.* Cremer, 2 Ph. 113; Erie etc. Co. *v.* Ramsey, 45 N. Y. 637.

[2] Richards *v.* West, 2 Green Ch. 456; Sullivan *v.* Judah, 4 Paige, 444.

[3] People *v.* Sturtevant, 9 N. Y. 263.

[4] Richards *v.* West, 2 Green Ch. 456.

[5] People *v.* Sturtevant, 9 N. Y. 263; Richards *v.* West, 2 Green Ch. 456; People *v.* Spalding, 2 Paige, 326; Commercial etc. *v.* Waters, 10 Miss. 559; Monroe *v.* Harkness, 1 Cranch C. C. 157; Same *v.* Bradley, Ib. 158, Mead *v.* Norris, 21 Wis. 310.

bility for the violation; on the contrary, it may be stated as a general rule, that where the writ has been duly served on defendants, they are liable for its violation, in whatever capacity or from whatever motive they may have acted.[1] But while, as we have seen in the preceding sections, the fact that an injunction was erroneously issued in the first instance affords no warrant or excuse to a defendant for a breach of its terms, yet such fact may properly be taken into consideration in awarding punishment for the breach.[2] Thus, where an injunction, irregularly and improperly issued in the first instance, has been violated by a defendant and his attorneys, the court may, on account of such irregularity, refuse to commit them for the breach, though requiring them to pay the costs thereby incurred, as well as the costs of the motion for commital.[3] And it has even been held, where the injunction was broader in its terms than was contemplated by the bill, that on motion for an attachment for a violation, the defendant should not be punished for disobeying so much of the writ as went further than the bill.[4]

§ 850. Where proceedings are instituted to punish a defendant for breach of an injunction, the fact of his guilt must be clearly and explicitly established to the satisfaction of the court.[5] But, while the injunction must be implicitly obeyed, it is the spirit and not the strict letter of the mandate to which obedience is exacted, and complainant failing to prove a violation of this to the satisfaction of the court, the rule for an attachment for contempt will be discharged.[6]

§ 851. So far as regards the rights of persons affected by an injunction, the fact that defendant has violated the mandate of the court under the advice of counsel, constitutes no sufficient ground of defense in his favor. We have already seen that the motive with which the breach is committed consti

[1] Quackenbush v. Vanriper, 2 Green Ch. 350.
[2] Sullivan v. Judah, 4 Paige, 444.
[3] Partington v. Booth, 3 Meriv. 148.
[4] Freeman v. Deming, 4 Edw. Ch. 598.
[5] Magennis v. Parkhurst, 3 Green Ch. 433.
[6] Id.

tutes no excuse for the wrongful act,[1] and equity will protect persons affected by the writ from any violation of its terms, even though committed under the sanction and advice of counsel.[2] Thus, where defendant has committed a breach of the injunction, he can not relieve himself from the responsibility for his conduct by the fact that it was committed under the advice of counsel that the service of the writ was defective, the officer not having exhibited the original writ, but only a copy thereof.[3] So where defendant, who has been served in person with a written notice that an order for an injunction against him has been made, proceeds with the commission of the acts enjoined, claiming to act under the advice of counsel that such notice was ineffectual to bind him, he is regarded as violating the injunction.[4] It is to be observed, however, that while the fact of defendant having committed the breach under the advice of counsel that he might safely disregard the writ, affords no justification for his conduct, yet it may properly be taken into account in determining the degree of punishment to be inflicted for the breach, and may thus palliate, though it can not justify the violation.[5]

§ 852. In considering the question of a defendant's liability for a breach of injunction, it is to be borne in mind that the injunction becomes operative from the time of the order being made, and not from the date of the writ itself, or from the time of its being drawn up.[6] The mandate of the court being effectual upon all parties having notice thereof, from the time it is given, to fix defendant's liability for a violation it is only necessary to show that he was actually apprised of the existence of the order at the time of committing the acts constituting the violation. Thus, where an injunction is granted to restrain the commission of waste, and before the writ actually

[1] Quackenbush v. Vanriper, 2 Green Ch. 350.

[2] Mead v. Norris, 21 Wis. 310; Hawley v. Bennett, 4 Paige, 163; Lansing v. Easton, 7 Paige, 364.

[3] Mead v. Norris, 21 Wis. 310.

[4] Kimpton v. Eve, 2 Ves. & B. 349.

[5] Erie etc. Co. v. Ramsey, 45 N. Y. 637.

[6] McNeil v. Garratt, 1 Cr. & Ph. 98; James v. Downes, 18 Ves. 522. And see Hearn v. Tennant, 14 Ves. 136.

issues or the order is drawn up, defendant is notified of the order, and its purport and effect are verbally explained to him, the cutting of timber after such notice constitutes a breach of the injunction.[1] So where an injunction is ordered against the commission of waste and the sale of crops, and defendant is served with written notice thereof, but proceeds to sell in disregard of the notice, though admitting his belief that the order was made, he is guilty of a violation of the mandate of the court, even though he claims to have acted under the advice of counsel.[2]

§ 853. Any means of information whereby notice of the order is brought to the knowledge of the parties enjoined, would seem sufficient to meet the requirements of the rule above laid down. And the courts have uniformly held that it is not requsite that a defendant, against whom an injunction has issued, should have been officially apprised of its existence, or served with process, to hold him liable for contempt in

[1] Vansandau v. Rose, 2 Jac. & W. 264. And see Gooch v. Marshall, 8 W. R. 410.

[2] Kimpton v. Eve, 2 Ves. & B. 349. This was an injunction against the commission of waste and the sale of straw and standing crops, defendant having proceeded to a sale after personal service upon him of a written notice that an order for the writ was granted. Defendant, by his affidavit, admitted his belief that the order had been made, but claimed to have acted by the advice of his solicitor, to the effect that a mere notice of the order had no binding force. Eldon, Lord Chancellor, observes: * * * "It is true that before Lord Hardwicke's time, who first made the exception of the case of a party actually present in court, hearing the order made, actual service of the injunction was required. Lord Hardwicke, I suppose, felt the enormous mischief of permitting a man, hearing an order pronounced restraining him from doing an act, to walk out of court and immediately do that act, before service of the injunction. But if that extension of the practice was right, the court could not stop short, refusing to apply the principle in other cases affording the same necessity for its application. I have heard some of my predecessors in this place treat as a great abuse of justice and want of consistency the refusal to apply that practice, which is applied to a person present in court and hearing the order, to a man standing outside of the court, and informed by some one who heard it that the order was pronounced." * * "In this case, the party admitting that he believed the order was made, the principle is the same as if his belief was formed from information short of actual service."

committing a breach of the injunction. If defendant is informed of the existence of the order, though not yet served with process, it is operative upon him, and he will not be allowed to disregard or violate it. It is enough to show that he has had actual notice of the existence of the writ, or of the order of the court that it should issue.[1] And one who has received notice of the order for an injunction, may be guilty of a breach of the mandate of the court and may be punished for contempt, even though the writ has not yet issued.[2] Otherwise the opportunity would be afforded of committing with impunity violations of the injunction between the time of ordering the writ and the time of its issuing, and thus the very acts would be permitted which it is the object of the injunction to prevent.[3]

§ 854. The rule as to defendant's liability for breach of an injunction upon notice of its existence, or of the order of the court, holds good even though there has been great negligence in serving the writ. And even where service has been delayed to such an extent as to constitute ground for a dissolution of the writ, he who violates it may still be attached for contempt.[4] So persons who remain in court during the argument of a motion for an injunction, can not, by leaving just before the order for the writ is made, evade the consequences of a breach of the injunction, they having known that the writ was actually issued; and they will be punished for contempt for its violation, though they were not present when the order was actually pronounced.[5] And where one has not been officially apprised of the issuing of an injunction, but has been informed of it by one of the parties to the suit, he will nevertheless be guilty of a contempt should he violate it.[6]

§ 855. The question of whether a breach of an injunction

[1] Hull v. Thomas, 3 Edw. Ch. 236; Howe v. Willard, 40 Vt. 654; Farnsworth v. Fowler, 1 Swan, 1; Skip v. Harwood, 3 Atk. 564; Hearn v. Tennant, 14 Ves. 136; McNeil v. Garratt, 1 Cr. & Ph. 98.

[2] McNeil v. Garratt, 1 Cr. & Ph. 98.

[3] Id.

[4] Howe v. Willard, 40 Vt. 654.

[5] Hearn v. Tennant, 14 Ves. 136.

[6] Hull v. Thomas, 3 Edw. Ch. 236.

has actually been committed, has been held to be dependent upon whether complainant in the action has complied with the terms upon which the relief was ordered. Thus, where an order has been obtained granting an injunction in restraint of a sale under execution, upon the usual terms of giving a bond to defendant for the payment of damages incurred, it is held that proceedings under the execution are not stayed until the conditions are complied with.[1] And in such case it is held to be no contempt of court to proceed with a sale under the execution, notwithstanding the chancellor's order was shown to the plaintiff in execution, and to the sheriff.[2]

II. What constitutes a Violation.

§ 856. Alleged violation must be injurious to rights of complainant in the injunction suit.
857. Regard must be had to terms of the writ.
858. Violation of injunctions to judgments at law.
859. Writ does not affect antecedent rights of person not a party to the suit.
860. Assignee of chose in action; trust property; joint plaintiffs.
861. Breach need not be committed in person; one who consents to violation is guilty.
862. Persons not named in writ not usually liable for its violation.
863. Members and agents of corporation liable for breach where they were apprised of writ.
864. Defective service no excuse for violation.
865. Injunction against disturbance of easement.
866. Regard must be had to objects of writ; mere intent to violate not punishable.

§ 856. It is frequently a matter of difficulty to decide what constitutes such a breach of an injunction as to warrant proceedings against a defendant for contempt. It has been laid down as a general rule, subject, however, to some exceptions, that the offense complained of as a violation must

[1] Clarke v. Hoomes's Ex'rs., 2 Hen. & M. 23.
[2] Id.

be injurious to the rights of the complainant in the action.[1] And where, after service of an injunction upon defendant, in a creditor's suit, he proceeds to judgment in an action previously begun against a third person, such conduct is not regarded as a breach of the mandate of the court, since it can work no injury to complainants in the injunction suit, and may benefit them.[2] So, too, where an injunction has been granted on a creditor's bill, the fact of the debtor afterward bringing suit against a third person for a tort, the tort consisting in taking property of the debtor, under execution, which was exempt by law, constitutes no violation of the injunction.[3]

§ 857. In determining whether an actual breach has been perpetrated, such as to warrant the court in committing for contempt, regard must be had to the terms of the injunction itself. And where the writ does not specifically restrain defendant from the commission of any definite act, but enjoins him in general terms from permitting certain injurious results to be produced by a particular cause, it must satisfactorily appear that the injurious result was actually produced by the given cause.[4] But where the mandate of the court has been violated in spirit as well as in letter, the court will not permit the general terms of the writ to be controlled or restricted by reference to the particular nature of the grievance.[5]

§ 858. Where an injunction has been granted to stay proceedings in an action at law, the mere delivery of a declaration has been deemed a violation of the writ.[6] And the service of a trial notice in the action enjoined,[7] or a motion for a change of venue,[8] is a breach of the mandate of the court. So where an injunction has been obtained against

[1] Hudson v. Plets, 11 Paige, 180. And see Parker v. Wakeman, 10 Paige, 485.

[2] Parker v. Wakeman, 10 Paige, 485.

[3] Hudson v. Plets, 11 Paige, 180.

[4] Dawson v. Paver, 5 Hare, 415.

[5] Attorney General v. Great Northern etc., 4 DeGex & Sm. 75.

[6] Mills v. Cobby, 1 Meriv. 3.

[7] Clark v. Wood, 2 Halst. Ch. 458; Bird v. Brancker, 2 Sm. & St. 186.

[8] Pariente v. Bensusan, 13 Sim. 522.

execution under a judgment, the taking of any steps toward execution beyond the completion of the judgment, is a violation of the injunction.[1] So, too, it has been held to be a violation of an injunction against proceedings at law to place in the hands of the sheriff an attachment for non-payment of costs, even though the costs in question were actually taxed before the writ was allowed.[2] And where, before the issuing of an injunction against proceedings at law, legal process had been placed in the hands of the sheriff, and the plaintiff in the action at law did not stop the process on being applied to by the sheriff for further instructions, his neglect to countermand the writ is held a contempt.[3]

§ 859. While it would seem that the agents of one against whom an injunction is awarded, having knowledge of the order, may be held liable for acts committed in violation of its terms,[4] yet one who was not a party to the proceedings, and who has acquired no rights from any of the parties, *pendente lite*, is not guilty of a breach of the injunction by exercising a right which belonged to him before the suit.[5] But a breach amounting to a contempt may be committed even by aiding one who acts in an official capacity and under authority of law. Thus, where an injunction is granted to quiet possession, defendant who assists a justice of the peace in making restitution upon a forcible entry, thereby commits a breach.[6]

§ 860. The assignee of a chose in action who, after the dissolution of an injunction against himself, institutes proceedings at law relative to the matter concerning which he was enjoined, is not guilty of a violation of the injunction, although it has not been dissolved as against his assignor.[7]

[1] Bullen v. Ovey, 16 Ves. 141; Mills v. Cobby, 1 Meriv. 3; Franklyn v. Thomas, 3 Meriv. 225.

[2] Partington v. Booth, 3 Meriv. 148.

[3] Woodley v. Boddington, 9 Sim. 214.

[4] Wellesley v. Mornington, 11 Beav. 181.

[5] Bootle v. Stanley, 2 Eq. Ca. Ab. 528.

[6] Woodward v. Earl of Lincoln, 3 Swanst. 626.

[7] Imperial etc. v. Clarke, Younge, 584.

Nor is the institution of an action at law by trustees to recover possession of trust property, a breach of an injunction which has been granted to prevent their selling such property, since the assertion of the legal title by the trustees may be necessary for the protection of the rights of all parties in interest.[1] But where three plaintiffs at law have been enjoined from proceeding with an action, and a dissolution is afterward allowed as against two of the plaintiffs, it is held to be a violation for the three afterward to proceed with the action; though if the injunction has been dissolved generally, and not merely as against the two, it is not a violation if the two should carry on the proceedings in the name of the three.[2]

§ 861. To render one liable for a violation of an injunction, it is not necessary that he should have actually committed the breach in person, and one who is present, aiding and abetting in the commission of the act, or who permits it to be done in his presence, and without remonstrance, is himself guilty of an actual breach of the injunction, and will be punished accordingly.[3] Thus, an attaching creditor who has been restrained from selling the property attached, violates the writ if he allows the attaching officer to sell in his presence without remonstrance, the officer being regarded as his agent for the purposes of the sale.[4] And one who quietly stands by and permits an injunction to be violated, is guilty of a contempt, no matter how unreasonable the provisions of the writ may have been.[5] If, however, complainant, at whose instance an injunction has been granted, himself consents to its violation, he is estopped from afterward having defendant punished for such violation.[6]

§ 862. The obligations of an injunction will not usually be extended to persons who are not named in the writ, and they

[1] Nichols v. Campbell, 10 Grat. 560.

[2] Money v. Jordan, 13 Beav. 229.

[3] St. John's College v. Carter, 4 Myl. & Cr. 497; Blood v. Martin, 21 Geo. 127.

[4] Blood v. Martin, 21 Geo. 127.

[5] Stimpson v. Putnam, 41 Vt. 238.

[6] Howard v. Durand, 36 Geo. 346.

will not be liable for a breach of a mandate which is not directed to them.[1] Thus, where the writ is simply directed to a defendant, without including his agents or servants, an agent will not be punished for a breach.[2] Nor will a person be punished for contempt because of the violation of an injunction by his servants, he himself being free from all blame in person.[3] But defendant may, in such case, be held liable for the costs of the proceedings to commit for the breach.[4] And where defendant's attorney has been enjoined from proceeding at law, it has been held a breach of the injunction for the defendant himself to proceed.[5] But where the writ restrains a person and his agents or servants, his tenants are not regarded as included in the prohibition.[6]

§ 863. Since an injunction granted against a corporation is binding upon all persons acting for or in behalf of the corporation who are apprised of the writ, it follows that all members of the corporation upon whom service is had are liable for a breach of the injunction. And the passage of a resolution by the common council of a city, granting a right which they are forbidden by injunction to grant, is a violation of the writ, although the terms of the resolution are not accepted by the person to whom the right is granted.[7] So the chief engineer of a steamboat, owned by a foreign corporation and running between two ports of different states, is liable for the violation of an injunction restraining the use of certain machinery upon the boat; and it is no excuse for him to say, he being a defendant in the injunction suit, that he was a mere agent of the corporation.[8]

§ 864. A defect in the service of the writ affords no excuse for its violation, and one may be guilty of contempt in disobeying an injunction, notwithstanding defective service by

[1] Iveson v. Harris, 7 Ves. 256; Wellesley v. Mornington, 11 Beav. 181.
[2] Wellesley v. Mornington, 11 Beav. 181.
[3] Rantzen v. Rothschild, 14 W. R. 96.
[4] Id.
[5] Sedgwick v. Redman, Cary, 44.
[6] Hodson v. Coppard, 29 Beav. 4.
[7] People v. Sturtevant, 9 N. Y. 263.
[8] Sickels v. Borden, 4 Blatch. 14.

the officer to whom it was entrusted. It is sufficient for the court to know that the person enjoined had actual knowledge of its order.[1] And an officer who, with due notice of an injunction against the sale of certain property under execution, nevertheless proceeds with the sale, becomes a trespasser *ab initio*, even though the property may have been levied upon before the injunction was granted.[2]

§ 865. Nothing will be deemed a violation of an injunction forbidding the disturbance of a particular right of way, which does not interfere with the free exercise of the right or easement. Thus, where there are several distinct but intimately connected rights, such as a right of way and a right of soil, an injunction having been granted for the preservation of one of them, a fair exercise of the other right will not be deemed a violation of the writ as to the first, if it leaves as large a scope for its exercise as before.[3]

§ 866. In deciding whether there has been an actual breach of an injunction, it is important to observe the objects for which the relief was granted, as well as the circumstances attending it.[4] And it is to be observed that the violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court.[5] Thus, where an injunction has been granted restraining a defendant and his servants and agents from obstructing and impeding the passage of canal boats, the bringing of fifteen actions of trespass against the canal company on account of the passage of that number of barges along that part of the canal flowing over the land in controversy, is a violation of the spirit of the injunction, and will be restrained.[6]

[1] Mead *v.* Norris, 21 Wis. 310.
[2] Turner *v.* Gatewood, 8 B. Mon. 613.
[3] Bosley *v.* Susquehanna etc., 3 Bland. 63.
[4] Loder *v.* Arnold, 15 Jur. 117.
[5] Grand Junction etc. *v.* Dimes, 17 Sim. 33.
[6] Id.

III. Remedy for Violation.

§ 867. Attachment for contempt; considerations to be observed in applying remedy.
868. Conduct and motives of parties taken into account; laches; acquiescence.
869. Complainant's laches.
870. Procedure in United States courts for breach of injunction.
871. Proof required; what defendant may show.
872. Parties enjoined in state courts violate writ by proceeding in United States courts.
873. Attachment will not lie for violation of injunction improperly issued; proceedings on behalf of the people.
874. Remedy against plaintiff in execution; infringement of statutory franchise.
875. Defendant in contempt for breach not usually allowed a hearing on motion to dissolve.
876. Practice on motion for attachment; costs.
877. Proceedings not reviewed on error, but on appeal; no objection that proceedings are against one of several defendants.

§ 867. The usual remedy for breach of injunction is by proceedings against the offending party for an attachment for contempt of court.[1] And in taking steps to punish such contempt, the court will not inquire into the merits of the cause in which the writ was issued, the only question for determination being whether the mandate of the court has been violated.[2] An order of commitment for breach of an injunction being *strictissimi juris*, it will not be granted except upon a clear and satisfactory showing of an actual violation.[3] The proceedings are *quasi* criminal in their nature, and may, it would seem, be brought on behalf of the people, though not necessarily conducted by counsel for the government.[4] And a

[1] Monroe v. Harkness, 1 Cranch C. C. 157; Monroe v. Bradley, Ib. 158.

[2] People v. Spalding, 2 Paige, 326.

[3] Mann v. Stephens, 15 Sim. 377; Grand Junction etc. v. Dimes, 17 Sim. 88; Worcester v. Truman, 1 McLean, 483.

[4] Worcester v. Truman, 1 McLean, 483; Crook v. The People, 16 Ill. 534, and cases cited.

person applying to a court of equity for the punishment of a party guilty of a breach of injunction, must show that he has some interest in the subject matter of the controversy which gave rise to the injunction.[1]

§ 868. The conduct of the party obtaining the injunction, as well as the motive of defendant in violating it, may properly be taken into account in determining defendant's liability for the breach.[2] And where an injunction is granted before proceedings at law, staying all proceedings, and defendant in the injunction suit afterward institutes an action in ejectment, to which complainant pleads, and suffers two months to elapse before taking any steps toward punishing the breach, the court will refuse to punish for contempt.[3] And where the person obtaining the writ misrepresents the action of the court to the public, and defendant, in endeavoring to correct such misrepresentation, commits a technical violation of the injunction, proceedings against him for contempt by the complainant will not be entertained.[4] But to deprive a party obtaining the writ of the right to move for a committal for its breach, on the ground of his acquiescence therein, a strong showing of acquiescence must be made out. Thus, where a defendant seeks to evade his liability for breach of an injunction restraining him from the use of complainant's trade mark, upon the ground of acquiescence, he must show such a degree of acquiescence as would suffice to create a new right in himself.[5]

[1] Hawley v. Bennett, 4 Paige, 163.

[2] Mills v. Cobby, 1 Meriv. 3; Barfield v. Nicholson, 2 L. J. Ch. 90.

[3] Mills v. Cobby, 1 Meriv. 3.

[4] Barfield v. Nicholson, 2 L. J. Ch. 90.

[5] Rodgers v. Nowill, 3 DeGex, M. & G. 614. The degree of acquiescence required to justify defendant is stated by Lord Justice Turner, as follows: "Then on the question of acquiescence, I think that in a case of this description, where there has been an injunction granted by this court, there must, in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined to do the act enjoined against, as would entitle him to maintain a bill against others for doing that act. The party enjoined must, I think, show such acquiescence as would be sufficient to create a new right in him."

§ 869. While, as we have already seen, the doctrine is well established, that to render a defendant liable for violating an injunction, it is only necessary that he should have been in any manner apprised of its existence, though not actually served with the writ,[1] yet complainant's laches in obtaining service may be taken into account upon a motion to commit for a breach. Thus, where complainant has suffered a period of four months to elapse, after the granting of the order, before getting it drawn up and served, although defendant may be in contempt, having been present in court on the hearing of the motion for the injunction, yet a motion to commit, under such circumstances, will be refused with costs.[2]

§ 870. The proper method of procedure for the punishment of a breach of injunction, in the courts of the United States, is by motion that the defendant stand committed for the violation, and he must be served with due notice of this motion. The object of the proceeding is the enforcement of obedience to the mandates of the court, by punishing any intentional violation of its process. The mode of relief being summary and rigorous, he who invokes the aid of equity for the punishment of a violation of injunction is required to show the allowance of the writ upon the conditions imposed by the

[1] See § 853, *ante*.

[2] James *v.* Downes, 18 Ves. 522. "A party can not," observes Lord Eldon, "be committed for the breach of an injunction, that express species of contempt, unless there is an injunction. On the other hand, if he was present when the order was made, the court will not permit him to elude its justice by doing that, before the injunction is sealed, which, if it was actually sealed, would be a contempt; but there is no instance, previous to the case of Hearn *v.* Tennant (14 Ves. 136), that the court ventured to consider the act of contempt, unless the party, being present in court, heard the order for an injunction made. My opinion on that occasion was, and still is, that if the party was in court while the motion was proceeding, he should not by turning his back before the court pronounced the order 'let the injunction go,' escape the process, considering it a mere contrivance; but the court can never intend that the plaintiff, having obtained the order granting the injunction, is to lie by four months as if it had not been granted. The court, interposing to assist the plaintiff and prevent his losing the benefit of the process, while he is actually pursuing it, can not consider him entitled under the order for three or four months together. Therefore dismiss this motion with costs."

court, that it has been duly served, and that defendant has been notified of the time and place of the motion.[1] But the courts of the United States can not punish for violation of an injunction issued from a state court, even though the cause has been removed, under the act of congress authorizing such removal, from the state to the United States courts, since such removal works a dissolution of the injunction, *ipso facto*.[2]

§ 871. It is incumbent upon complainant, in moving an attachment against a defendant for contempt of court in disobeying an injunction, to state in the proofs upon which the application is founded the specific acts of omission, or of commission, which constitute the alleged contempt.[3] And in proceedings for contempt, proofs are properly admissible to contradict the answers of the defendant to the interrogatories propounded to him.[4] And it is competent for a defendant, charged with a breach, as in the case of an injunction against the infringement of a patent, to show his compliance with the writ while it remained in force, and that it carried on its face the period of its duration, which having expired, he could not be guilty of a breach.[5]

[1] Worcester *v.* Truman, 1 McLean, 483. The nature of the proceedings for the punishment of a violation of injunction, and the conditions requisite to the exercise of this summary jurisdiction of courts of equity in enforcing obedience to their mandates, are well laid down by McLean, J., in this case, as follows: "This, although in the nature of a criminal proceeding, is not in fact strictly of that character. It is instituted and carried on by the counsel for the plaintiff, and not necessarily by the attorney for the government. The object of the proceeding is to enforce obedience to the process of the court, by punishing an intentional disregard of it. The mode is summary and rigorous, and the party who thus invokes the aid of the court should bring himself strictly within the rule which entitles him to the redress sought, and subjects the defendant to the punishment which must follow. He must show the allowance of the injunction, that it has been issued on the terms specified and within the limits imposed, that it has been duly served, and that notice has been given to the defendant of the time and place of the motion 'that he stand committed for a breach of the injunction.'"

[2] McLeod *v.* Duncan, 5 McLean, 343.

[3] Parkhurst *v.* Kinsman, 2 Blatch. 76.

[4] Crook *v.* The People, 16 Ill. 534.

[5] Daw *v.* Eley, L. R. 3 Eq. 496.

§ 872. Where parties having a right of action, either in the state or in the United States courts, voluntarily bring their action in the former, and are there enjoined from further proceedings until certain assets shall be marshaled, it is a contempt of court for them to bring their action in the United States courts, pending such injunction, and the attorneys may be punished for contempt in thus disregarding the mandate of the state tribunal.[1]

§ 873. We have already seen that the fact of an injunction having been erroneously granted in the first instance, affords no justification or excuse for its violation.[2] It may, however, affect the question of punishment, and may be taken into consideration by the court in determining whether a defendant shall be attached for contempt. And it has been held that after the dissolution of an injunction erroneously or improperly granted, an attachment for its violation will not lie.[3] But where proceedings are instituted on behalf of the people for contempt in the violation of an injunction, they may, if begun before, be prosecuted after the injunction is dissolved.[4] And in such proceedings proof may be taken to contradict the answers of the party to the interrogatories propounded to him.[5]

§ 874. The proper remedy against a plaintiff in execution who proceeds with a levy, notwithstanding he has been enjoined from so doing, is by attachment, and not by *supersedeas*.[6] And where an injunction has been issued to prevent the infringement of a statutory franchise, an attachment will issue for contempt in violating the writ.[7]

§ 875. One who is in contempt for a violation of an injunction will not usually be allowed a hearing upon a motion to dissolve, though if the nature and extent of the punishment

[1] Hines *v.* Rawson, 40 Geo. 356.

[2] Moat *v.* Holbein, 2 Edw. Ch. 188; People *v.* Sturtevant, 9 N. Y. 263; Sullivan *v.* Judah, 4 Paige, 444; Richards *v.* West, 2 Green Ch. 456.

[3] Moat *v.* Holbein, 2 Edw. Ch. 188.

[4] Crook *v.* The People, 16 Ill. 534.

[5] Id.

[6] Commercial Bank *v.* Waters, 10 Sm. & Mar. Miss. 559.

[7] *In re* Vanderbilt, 4 Johns. Ch. 57.

to be inflicted depend upon the determination of the question whether the injunction shall be continued, a hearing may be had on the motion to dissolve.[1] But for the purposes of a motion to attach for contempt in violating an injunction, it must clearly appear that defendant was apprised of the order of the court; and where there are doubts as to the question of service of the writ, an attachment for a breach thereof will be denied.[2]

§ 876. Upon a motion for an attachment for a breach of an injunction restraining the use of a patent right, affidavits will not be admitted to show that complainant was not the original inventor. The question in such a case is not as to the merits of the writ itself, but whether it has actually been disobeyed.[3] And if it be made to appear that the injunction has really been violated, but defendant is protected from attachment by a defective service of the writ, he will not be allowed costs on refusal of the motion to attach.[4]

§ 877. Where proceedings have been instituted for the punishment of a breach of injunction, an order of court adjudging defendants guilty of contempt in violating the writ can not be reviewed on writ of error, but only upon appeal.[5] And the breach of an injunction, being in the nature of a tort, it constitutes no valid objection to proceedings for a committal that complainant has moved against but one of the defendants.[6]

[1] Endicott v. Mathis, 1 Stockt. 110.
[2] Whipple v. Hutchinson, 4 Blatch. 190.
[3] Id.
[4] Id.
[5] Shannon v. State of Wisconsin, 18 Wis. 604.
[6] Newman v. Ring, 10 Jur. 468.

CHAPTER XX.

OF THE DISSOLUTION OF INTERLOCUTORY INJUNCTIONS.

I. General Grounds of a Dissolution and its Effect.
II. Dissolution upon the coming in of the Answer.
III. Dissolution of Injunctions against several joint Defendants.
IV. Dissolution of Injunctions against Proceedings at Law.
V. Dissolution of Injunctions affecting the Title to Realty.
VI. Special Grounds of Dissolution.

I. General Grounds of a Dissolution and its Effect.

§ 878. General rule as to dissolution.
879. Motion to dissolve, when entertained.
880. When dissolution allowed before answer.
881. Burden of proof; effect of answer.
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892. Test to be applied.
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894. Defendant's laches a bar to obtaining a dissolution.
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§ 878. A marked feature of interlocutory injunctions, as distinguished from those which are final or perpetual, is that the former are liable to be dissolved upon sufficient cause

shown at any stage of the proceedings, after the coming in of the answer. And in general it may be said to rest in the sound discretion of the court to dissolve an interlocutory injunction upon the coming in of the answer denying the equities of the bill, or to continue it until a final hearing on the merits, if such course shall seem best calculated to subserve the ends of justice and to protect the rights of all parties in interest.[1] And in granting a dissolution the court may, in its discretion, impose such terms as may be necessary to secure substantial justice.[2]

§ 879. While the rule has been broadly laid down that an interlocutory or preliminary injunction may be dissolved at any stage of the cause, either before or after answer filed, or after demurrer to the bill,[3] the better doctrine seems to be that a motion to dissolve will not be entertained until after the coming in of the answer.[4] Nor should a motion to dissolve be entertained pending a general demurrer to the bill, since the motion involves the same questions of equity that must arise upon the demurrer, and is an attempt to obtain, by the summary action of the court, a decision as to the equity of the case, which should be determined upon demurrer.[5] But in the case of a bill of discovery, which also prays an injunction against a judgment at law, if the bill contains no allegations sufficient to entitle complainant to a discovery, and no ground upon which the injunction can be sustained, a dissolution may be had upon motion, without the answer of the party from whom the discovery is sought.[6] Though a motion to dissolve such an injunction for want of equity in the bill, will not be allowed before answer filed, where the bill charges

[1] Chetwood v. Brittan, 1 Green Ch. 438; Firmstone v. DeCamp, 2 C. E. Green, 309; Attorney General v. Oakland etc., Walk. Mich. 90; Shellman v. Scott, Charlt. R. M. 380; Holt v. Bank of Augusta, 9 Geo. 552; Dent v. Summerlin, 12 Geo. 5.

[2] Cook v. Jenkins, 35 Geo. 113.

[3] Jones v. Commercial Bank, 5 How. Miss. 43. And see Minturn v. Seymour, 4 Johns. Ch. 173.

[4] Rentfroe v. Dickinson, 1 Overt. 196; Taylor v. Morgan, 2 Mart. O. S. 77.

[5] Ransom v. Shuler, 8 Ired. Eq. 304.

[6] Zoll v. Campbell, 3 West Va. 226.

that the obligations sued on at law were obtained without consideration and by fraud, and the affidavits annexed to the bill are sufficient to make out a *prima facie* case of fraud.[1]

§ 880. Where an injunction has been irregularly obtained, or complainant has not used due diligence in the prosecution of his suit, it may be dissolved before the coming in of the answer.[2] And a motion to dissolve will be entertained, notwithstanding complainant has amended his bill and no answer has yet been filed to the bill as amended.[3] And where upon its face the bill is wanting in equity to sustain the injunction, it may be dissolved on motion without answer.[4] Or, if an injunction has been granted contrary to the provisions of an imperative statute, the defendant is entitled to summary relief, and the order will be set aside for irregularity, without putting him to his motion to dissolve.[5]

§ 881. Upon the hearing of a motion to dissolve an injunction, the defendant is considered as the actor, and on him rests the burden of disproving the equities of the bill.[6] Such full and positive proof, however, is not exacted as would be necessary upon a final hearing of the cause, since the effect of requiring such strictness of proof would be to prevent a dissolution until the final hearing.[7] And while, for the purposes of such motion, defendant's answer is to be taken as true in so far as it is responsive to the allegations of the bill, yet it should fully and fairly meet complainant's equities, without evasion and without passing over material allegations. Even then, if a reasonable doubt exists in the mind of the

[1] Shotwell's Admr'x. *v.* Smith, 5 C. E. Green, 79.

[2] Depeyster *v.* Graves, 2 Johns. Ch. 148; Woodhull *v.* Neafie, 1 Green Ch. 409, and note; Corey *v.* Voorhies, Ib. 5; West *v.* Smith, Ib. 309; Receivers etc. *v.* Biddle, 3 Green Ch. 222. But see, *contra*, Taylor *v.* Morgan, 2 Mart. O. S. 77.

[3] Semmes *v.* Mayor etc., 19 Geo. 471.

[4] Kneedler *v.* Lane, 3 Grant's Cases, 523.

[5] Marlatt *v.* Perrine, 2 C. E. Green, 49. And see, as to the distinction between discharging an injunction for irregularity and dissolving it for want of equity, Judah *v.* Chiles, 3 J. J. Marsh. 302.

[6] Miller *v.* Washburn, 3 Ired. Eq. 161.

[7] North's Ex'r. *v.* Perrow, 4 Rand. 1.

court as to whether the equity of the bill is sufficiently answered, the injunction will not be dissolved, but will be continued to the hearing.[1] And upon motion to dissolve, the answer is taken as evidence only of such facts as are responsive to the bill.[2]

§ 882. On a motion to dissolve upon bill and answer, such allegations of the bill as are not denied by the answer are to be taken as true, since they stand upon the affidavit of complainant and are entitled to as much weight upon the motion to dissolve as upon the original motion for the injunction.[3] It follows, therefore, that everything is to be presumed against the defendant with respect to any matter as to which he might have answered fully and directly, but has not done so.[4] And so long as any material allegations of the bill remain unanswered, the injunction will not be dissolved, but will be continued until the final hearing of the cause.[5]

§ 883. To warrant a dissolution upon bill and answer, the answer should deny the material allegations of the bill with the same clearness and certainty with which they are charged.[6] And for the purposes of such a motion, the answer is considered only in so far as it is responsive to the allegations of the bill on which the writ issued.[7] New matter, therefore, not responsive to any allegation of the bill, will not be considered on the hearing of such a motion.[8] But if the answer so far denies the material allegations of the bill as to leave it without equity, even as to facts which it does not deny, the injunction will be dissolved.[9]

[1] North's Ex'r. v. Perrow, 4 Rand. 1.

[2] Robinson v. Cathcart, 2 Cranch C. C. 590. And see Rembert v. Brown, 17 Ala. 667.

[3] Brown v. Stewart, 1 Md. Ch. 87; Cronise v. Clark, 4 Md. Ch. 408; Randolph v. Randolph, 6 Rand. 194; Merwin v. Smith, 1 Green Ch. 182. And see Parks v. Spurgin, 3 Ired. Eq. 153.

[4] Parks v. Spurgin, 3 Ired. Eq. 153.

[5] Brown v. Stewart, 1 Md. Ch. 87.

[6] Buckner v. Bierne, 9 Sm. & Mar. Miss. 304.

[7] Rembert v. Brown, 17 Ala. 667. And see Robinson v. Cathcart, 2 Cranch C. C. 590.

[8] Wooten v. Smith, 27 Geo. 216. And see Lawrence v. Philpot, Ib. 585.

[9] Moore v. Barclay, 23 Ala. 739; Rogers v. Bradford, 29 Ala. 474.

§ 884. Where an injunction is so vague and indefinite in its terms as not to apprise defendants of the premises touching which they are enjoined, a dissolution should be allowed.[1] But where the bill shows on its face sufficient cause for granting the injunction, it is error to dissolve it on motion for want of equity.[2] And if defendant declines answering, he is to be regarded on the motion to dissolve as admitting the material allegations of the bill, and it is therefore error to dissolve the injunction, sufficient cause for its retention appearing upon the bill itself.[3] If, however, the whole equity of the bill be denied by the answer, it is no sufficient objection to the motion to dissolve that defendant has incorporated scandalous and impertinent matter into his answer.[4]

§ 885. Deception or misrepresentation on the part of the person obtaining the injunction, affords strong ground for its dissolution. And where it is apparent upon a motion to dissolve an injunction granted *ex parte*, that complainant has misrepresented his case, either by actual misstatement, or by a suppression of facts material to a full understanding of the equities involved, and that upon a correct statement of the facts the writ would not have been granted, such misrepresentation is of itself a sufficient ground for a dissolution.[5] Nor is it a sufficient explanation of complainant's conduct in such a case to say that he had forgotten the facts which were omitted, or that he was not aware of their importance.[6] But in order to bring a case within the rule as here laid down, the degree of misrepresentation must have been such as to have influenced the court in granting the writ, by presenting a case different from that which actually existed.[7] And the

[1] Avery *v.* Onillon, 10 La. An. 127.

[2] Floyd *v.* Turner, 23 Tex. 292.

[3] Peatross *v.* McLaughlin, 6 Grat. 64.

[4] Livingston *v.* Livingston, 4 Paige, 111.

[5] Endicott *v.* Mathis, 1 Stockt. 110; Brown *v.* Newall, 2 Myl. & Cr. 558; Greenhalgh *v.* Manchester etc., 3 Myl. & Cr. 799; Stedman *v.* Webb, 4 Myl. & Cr. 346.

[6] Clifton *v.* Robinson, 16 Beav. 355; Attorney General *v.* Liverpool, 1 Myl. & Cr. 171.

[7] Brown *v.* Newall, 2 Myl. & Cr. 558.

fact that an injunction granted *ex parte* has been dissolved because of the suppression of material facts in obtaining it, constitutes no bar to a future application for another injunction in the same case.[1] And it would seem that the question as to whether there was a misrepresentation or suppression of important facts in obtaining an injunction, will not be considered on appeal from an order granting or continuing the writ.[2]

§ 886. To entitle a defendant to a dissolution of an injunction, he must deny the entire equity of the bill, directly and without evasion. It will not suffice that he answers the several charges or allegations literally, but he must traverse the substance of each charge specifically and not merely by a vague and general denial. And where defendant's answer is manifestly evasive and indirect, even though it may be true in substance as alleged, the motion to dissolve will not be allowed.[3] The doctrine as thus stated seems to follow necessarily from the rule, that for the purposes of a motion to dissolve an injunction, any allegation in the bill which is evaded by the answer is to be taken as true in substance.[4] And where defendants answer evasively, alleging an improbable version of the transactions out of which complainant's equities have arisen, the court may, in the exercise of a sound discretion, order the injunction continued to the final hearing.[5]

§ 887. Where, however, some of the denials in an answer relied upon for the dissolution of an injunction, though true in themselves, are yet evasive by reason of the manner in which they are made, and are not such as would be sustained on exceptions, yet if other portions of the answer allege facts responsive to the bill, and which, by reason of their being inconsistent with the allegations of the bill, thus deny such allegations, such portions of the answer may be taken in

[1] Fitch *v.* Rochfort, 18 L. J. Ch. 458.

[2] Bell *v.* Hull etc., 1 Ra. Ca. 616.

[3] Everly *v.* Rice, 3 Green Ch. 553; Rich *v.* Thomas, 4 Jones Eq. 71; Wilson *v.* Mace, 2 Jones Eq. 5.

[4] Wilson *v.* Hendricks, 1 Jones Eq. 295.

[5] Jones *v.* Edwards, 4 Jones Eq. 257.

connection with its evasive allegations, and thus constitute a sufficient denial to warrant a dissolution.[1]

§ 888. Where, as is frequently if not generally the case with interlocutory injunctions, the injunction is merely auxiliary to the principal relief sought by the bill, the dismissal of the bill of necessity works a dissolution of the injunction, *ipso facto*.[2] Upon the bill being dismissed, therefore, the injunction falls as of course, and without further proceedings.[3] So where the bill for injunction is auxiliary to an action at law, on the dismissal of the proceedings at law, the injunction usually shares the same fate.[4] But where a railway company is enjoined from using complainant's land until satisfaction of a judgment obtained against the company for the appropriation of his land, the order for the injunction will not be reversed because of the reversal of the judgment for want of jurisdiction.[5]

§ 889. It does not follow, however, that upon the dissolution of an injunction, the bill upon which it was granted must be dismissed, since other and further proceedings may be necessary to give the relief sought by the action, and complainant is still entitled to continue his cause as an original suit whenever further proceedings are necessary to give him relief.[6] And the injunction being regarded as collateral to the main object of the bill, the suit remains after its dissolution, and no motion to retain it is necessary.[7] It is therefore erroneous to dismiss the bill upon dissolving the injunction, and complainant has a right to proceed to a final hearing of the cause as if no injunction had been prayed or granted.[8]

§ 890. The fact of a preliminary injunction, granted in an

[1] McMahon *v.* O'Donnell, 5 C. E. Green, 306.

[2] Green *v.* Pulsford, 2 Beav. 72; Coleman *v.* Hudson etc., 5 Blatch. 56.

[3] Green *v.* Pulsford, 2 Beav. 72.

[4] Phelps *v.* Foster, 18 Ill. 309.

[5] Sturtevant *v.* Milwaukee etc., 11 Wis. 63.

[6] Blow *v.* Taylor, 4 Hen. & M. 159; Ruffners *v.* Barrett, 6 Munf. 207; Massie *v.* Mann, 17 Iowa, 181.

[7] Cole *v.* Sands, 1 Overt. 183.

[8] Johnston *v.* Alexander, 6 Ark. 302; Bettison *v.* Jennings, 8 Ark. 287; Walters *v.* Fredericks, 11 Iowa, 181.

inferior court, having been dissolved without a dismissal of the bill, constitutes no bar to complainants obtaining relief in a superior court upon the same equities.[1] But where the writ has been granted merely as auxiliary to the principal relief sought, as in the case of a bill for specific performance of a contract, with an injunction in aid thereof, the injunction will be dissolved when the case presented by the bill is such as would not authorize the aid of equity to enforce the contract.[2]

§ 891. The authorities are somewhat conflicting upon the right of appeal from an order of a court of original jurisdiction, dissolving a preliminary or interlocutory injunction, though the weight of authority supports the proposition that the power of dissolving, like that of granting preliminary injunctions, being a matter of sound discretion with the court, an appeal or writ of error will not lie from an order dissolving such an injunction.[3] Where, however, the statutes of a state authorize an appeal by any person aggrieved from any judgment, decree or order of a court of equity, an appeal has been allowed from an order continuing an injunction after answer.[4]

[1] Roberts *v.* Jordans, 3 Munf. 488.

[2] Geiger *v.* Green, 4 Gill, 472.

[3] Van Dewater *v.* Kelsey, 1 N. Y. 538; Young *v.* Grundy, 6 Cranch, 51; Boinay *v.* Coats, 17 Mich. 411; Choteau *v.* Rice, 1 Minn. 24; Pickle *v.* Holland, 24 Miss. 566.

[4] McVickar *v.* Wolcott, 4 Johns. 510. The following observations of Spencer, J., embody the reasons for sustaining the right of appeal in such a case: "This appeal is from an order of the court of chancery, continuing an injunction after answer, and directing the payment of costs by the appellants to the respondents for resisting the motion to dissolve the injunction issued on filing the bill. It has been objected preliminarily that no appeal is maintainable upon an order like the present. The twenty-second article of the constitution and the eighth section of the act regulating proceedings on appeal and error have been cited. The constitution does not profess to specify any regulations upon the subject, but directs that a court shall be instituted for the trial of impeachments and the correction of errors, under the regulations which shall be established by the legislature. The section of the statute referred to declares that all persons aggrieved by any sentence, judgment, decree or order of the court of chancery, or court of probate, may appeal from the same, or any part thereof, to this court. The decision of the chancellor, in denying a dissolution of the injunction, directing it to be retained, and awarding

And a distinction has been drawn between cases where a dissolution of the injunction affects the merits of the cause, involving a decision upon material questions in controversy, and cases where the dissolution does not go to the merits, but affects simply collateral matters, or questions purely within the discretion of the court, the right of appeal being recognized in the former class of cases, but denied in the latter.[1]

§ 892. The unsettled state of the authorities upon this question is largely due to the difference in local usage, and the statutes regulating the right of appeal in the various states; and upon a question so dependent upon statutory enactment, it is exceedingly difficult, if not impossible, to lay down any general rule which shall be of universal application. If, however, the injunction is the only relief sought by the bill, an order for its dissolution may be regarded as a final order, and as such subject to review by an appellate court.[2] But an appellate court will rarely, if ever, interfere with such an order except the case be free from doubt, or where some principle of law or equity has been violated, or unless the case is very clearly one of an abuse of discretion on the part of the court below.[3]

§ 893. An appeal from a decree dissolving an injunction does not have the effect of reviving and continuing the injunction itself, since the process of the court, when once discharged,

costs against the appellants, brings this case within the terms of the statute. An order of that court has intervened, in relation to which the appellants are aggrieved by the payment of costs, if that order is not justified on legal principles. That orders may be appealed from, it is now too late to controvert; the practice of this court, in hearing such appeals in a variety of cases, has given a construction to the statute not to be shaken. Without undertaking to draw the line between such orders as may or may not be appealed from, in my opinion, this is an order from which an appeal lies. In coming to a decision on a motion before the court of chancery, there must necessarily have been an examination into the merits of the case, as disclosed by bill and answer, and the appellants have sustained a *gravamen* in the payment of costs."

[1] Trustees etc. *v.* Davenport, 7 Iowa, 213.

[2] Titus *v.* Mabee, 25 Ill. 257.

[3] Fleischman *v.* Young, 1 Stockt. 620; Garr *v.* Hill, 1 Halst. Ch. 639; Loyless *v.* Howell, 15 Geo. 554.

can only be revived by a new exercise of judicial power. An appeal being merely the act of the party, can not, of itself, affect the validity of the order of the court, nor can it give new life and force to an injunction which the court has decreed no longer exists. It follows, therefore, that an appeal from a decree dissolving an injunction, which had been granted to stay proceedings under an execution at law, can not have the effect of reviving the injunction so as to operate as a stay of proceedings at law, and the plaintiff in execution may proceed to enforce his judgment, notwithstanding the appeal.[1] But it

[1] Garrow *v.* Carpenter, 4 Stew. & P. 336; Chegary *v.* Scofield, 1 Halst. Ch. 525; Hoyt *v.* Gelston, 13 Johns. 139; Wood *v.* Dwight, 7 Johns. Ch. 295. But see, *contra*, Penrice *v.* Wallis, 37 Miss. 172. In Hoyt *v.* Gelston, it is said, *per curiam:* "In this case the injunction had been dissolved, from which order there was an appeal; and it is now urged that this appeal suspends all proceedings in this court, as much as if the injunction was still in full force. To give such effect to an appeal from an order dissolving an injunction would be very mischievous in practice, and serve as a great engine of delay. We must consider the case now in this court as if no injunction had ever issued. If the parties have committed any contempt, by proceeding, application must be made to the court of chancery to punish such contempt, but that is a matter with which this court has no concern. It is enough for us that there is no existing injunction. Suppose application had been made in the first instance to the chancellor and he had refused the injunction, an appeal would have lain from such refusal; but such appeal would not tie up the proceedings at law. If an appeal was to have such an operation, applications for injunctions might be perverted to the worst of purposes." And in Wood *v.* Dwight, 7 Johns. Ch. 295, Kent, Chancellor, observes that "if the order dissolving an injunction, or discharging a party from a writ of *ne exeat*, was duly entered, no subsequent appeal by the dissatisfied party could, of itself, affect the validity of the order, or revive the process and give it force and effect. An appeal only stays future proceedings in the court; but here is no further proceeding. The order is perfect and finished *eo instanti* that it is entered; and if the injunction could be revived by the mere act of the party in filing an appeal, it would be giving to him not only a power of control over the orders of the court, but of creating an injunction. The Supreme Court of this state in Hoyt *v.* Gelston (13 Johns. Rep. 139), held that an injunction was not revived by an appeal, so as to operate as a stay of proceedings at law; and the Supreme Court of the United States, in Young *v.* Grundy, 6 Cranch, 51, held that no appeal would even lie upon an interlocutory order dissolving an injunction. Whether an appeal can be sustained, is a question for the Court of Errors; but supposing it can be sustained, it is impossible that a process that is duly discharged, and *functus officio*, can be revived by the

would seem that, pending an appeal from a decree dissolving a temporary injunction, the appellate court may grant a temporary injunction staying the proceedings to restrain which the original injunction was sought.[1]

§ 894. Delay or laches on the part of a defendant in seeking the aid of the court for the dissolution of an injunction, may constitute sufficient ground for refusing the motion. And where there has been long acquiescence under an order for an injunction, the courts are slow to entertain a motion for its dissolution.[2] And although complainant was guilty of a suppression of material facts in obtaining the injunction, yet a delay of several months on the part of defendants before taking steps for its dissolution, will prevent them from obtaining a dissolution on the ground of the deception used in obtaining the writ.[3] Even though the court had no jurisdiction of the case originally, defendant's acquiescence may be such as to warrant the court in retaining the order on the undertaking of complainant.[4]

§ 895. The rule is well settled, that on a motion to dissolve an injunction, defendant will not be permitted to rely upon new matter in his answer in avoidance, but can only rely upon a direct and positive denial of complainant's equities.[5] And no principle of the law of injunctions is better established than that where the equity of the bill is admitted by the answer, or is not denied, and the answer sets up new matter in avoidance, or contains matter which amounts to a

mere act of the party. How could this court undertake to enforce the process and punish contempts of it in the very face of the order dissolving it? When a process is once discharged and dead, it is gone forever; and it never can be revived, but by a new exercise of judicial power. It is sufficient, in this case, to declare that the defendant is entitled to pursue his remedy at law, equally as if no injunction had issued; and no special leave to proceed is requisite."

[1] Chegary *v.* Scofield, 1 Halst. Ch. 525; Doughty *v.* Somerville etc., 3 Halst. Ch. 629.

[2] Feistel *v.* King's College, 10 Beav. 491; Bickford *v.* Skews, 4 Myl. & Cr. 500; Bell *v.* Hull etc., 1 Ra. Ca. 616.

[3] Bell *v.* Hull etc., *supra.*

[4] Cardinall *v.* Molyneux, 7 Jur. N. S. 864.

[5] Salmon *v.* Clagett, 3 Bland, 125; Bellona Company's Case, Ib. 442.

defense, such answer is not equivalent to a denial of complainant's equities and the injunction will not be dissolved, but will be continued until a hearing of the cause.[1] So a defendant upon a motion to dissolve will not be allowed to avail himself of new matter set up in a supplemental answer.[2] Where, however, the answer fully and unequivocally denies all the material allegations of the bill, the fact that it contains new matter, in addition to that in denial, constitutes no bar to a dissolution of the injunction.[3]

II. Dissolution upon the coming in of the Answer.

§ 896. General rule.
897. Illustrations of the rule.
898. Exception to the rule requiring positive denials in the answer.
899. The general rule not imperative; discretion of the court.
900. Illustrations of the discretionary power of the court.
901. Dissolution refused where court desires additional information.
902. Considerations of relative convenience.
903. The rule limited to explicit denials in the answer.
904. Requisites of the answer.
905. Rule only departed from under special circumstances; laches.
906. Dissolution in part.
907. Effect of evasive answer.
908. Verification of answer by corporation.

§ 896. Upon motion to dissolve an injunction on bill and answer, the answer, in so far as it is responsive to the bill, is to be taken as true.[4] And it is a well-settled rule that where the answer fully and unequivocally denies all the material

[1] Moss *v.* Pettingill, 3 Minn. 217; Green *v.* Pallas, 1 Beas. 267; Society etc. *v.* Low, 2 C. E. Green, 19; Huffmann *v.* Hummer, 2 C. E. Green, 263; McNamara *v.* Irwin, 2 Dev. & Bat. Eq. 13; Lyrely *v.* Wheeler, 3 Ired. Eq. 170; Strong *v.* Menzies, 6 Ired. Eq. 544; Attorney General *v.* Oakland etc., Walk. Mich. 90; Kerns *v.* Chambers, 3 Ired. Eq. 576; Hutchins *v.* Hope, 12 Gill & J. 245. But see Society *v.* Butler, 1 Beas. 498, reversing same case, Ib. 264.

[2] Maryland *v.* Northern etc., 18 Md. 193.

[3] Shricker *v.* Field, 9 Iowa, 366.

[4] Harris *v.* Sangston, 4 Md. Ch. 394.

allegations of the bill upon which complainant's equities rest, the injunction will be dissolved.[1]. And where it is shown by a special plea that there is no equity in the bill, the result, so far as regards the motion to dissolve, is the same as if the allegations of the bill were fully denied by answer.[2] It is to be observed, however, that the rule requires positive averments in the answer, and not merely general allegations of denial based on information and belief.[3] In other words, the denial must be of the same positive character as the averments in the bill on which complainant's equities are based, and where in the bill material facts are positively averred, a denial in the answer of sufficient knowledge on which to form a belief does not meet the requirements of the rule.[4]

§ 897. In conformity with the general rule, an injunction against proceedings at law, obtained on the ground of fraud, will be dissolved where the answer fully and clearly disproves all fraud and shows a *bona fide* indebtedness and full consideration for the judgment, and it not appearing that the suits, although several in number, are malicious or vexatious.[5] So an injunction to a judgment at law will be dissolved upon the coming in of the answer fully denying complainant's equity, except as to one point on which defendant is ignorant and which is not charged by the bill to be within his knowledge, every other allegation upon which complainant's equity rests being fully and positively denied.[6]

§ 898. The rule requiring the averments of the answer to

[1] Couch *v.* Ulster etc., 4 Johns. Ch. 26; Hollister *v.* Barkley, 9 N. H. 230; Armstrong *v.* Sanford, 7 Minn. 49; Anderson *v.* Reed, 11 Iowa, 177; Stevens *v.* Myers, Ib. 183; Taylor *v.* Dickinson, 15 Iowa, 483; Hatch *v.* Daniels, 1 Halst. Ch. 14; Washer *v.* Brown, Ib. 81; Morris etc. *v.* Fagan, 3 C. E. Green, 215; Suffern *v.* Butler, Ib. 220; Parkinson *v.* Trousdale, 3 Scam. 367; Harris *v.* Sangston, 4 Md. Ch. 394; Schoeffler *v.* Schwarting, 17 Wis. 30; Roberts *v.* Anderson, 2 Johns. Ch. 202; Kaighn *v.* Fuller, 1 McCart. 419.

[2] Eldred *v.* Camp, Harring. Mich. 162.

[3] Doub *v.* Barnes, 4 Gill, 1; Attorney General *v.* Oakland etc., Walk Mich. 90.

[4] Smith *v.* Appleton, 19 Wis, 468.

[5] Jackson *v.* Darcy, Saxt. 194.

[6] Capehart *v.* Mhoon, Busb. Eq. 30.

be positive, and not upon information and belief, is occasionally relaxed where, from the nature of the case, the defendant can not deny the allegations of the bill upon his own personal knowledge. Thus, where the answer is by the administrator of one who was a party to the contract out of which the alleged equities arose, and it denies those equities upon information and belief, such denial, if sustained and strengthened by some of the allegations of the bill, and if in itself consistent and probable, will warrant a dissolution of the injunction.[1] But in the absence of such circumstances tending to strengthen the averments of the answer of a defendant who, from his representative character as an executor or administrator, can have no personal knowledge of the facts, his denial upon information and belief will not warrant a dissolution where the equities of the bill are positively charged.[2]

§ 899. To the general rule that a preliminary injunction will be dissolved on the coming in of the answer fully denying the equities of the bill, there are numerous exceptions, based upon recognized principles of equity, which may not inappropriately be noticed in this connection. And, in the first place, it is to be constantly borne in mind that the dissolution, like the granting of interlocutory injunctions, is largely a matter of judicial discretion, to be determined by the nature of the particular case under consideration. A dissolution, therefore, does not follow necessarily and of course upon the coming in of the answer denying the material allegations of the bill upon which the injunction issued, and the court may, in the exercise of a sound discretion, refuse a dissolution and continue the injunction to the hearing, where the circumstances of the case seem to demand this course.[3] Especially will this dis-

[1] Clayton *v.* Lyle, 2 Jones Eq. 188; Coale *v.* Chase, 1 Bland, 136. But see, *contra*, Williams *v.* Stevens' Adm'r., 1 Halst. Ch. 119.

[2] Powell *v.* Brown, 22 Geo. 275.

[3] Chetwood *v.* Brittan, 1 Green Ch. 438; Irick *v.* Black, 2 C. E. Green, 189; Firmstone *v.* DeCamp, 2 C. E. Green, 309; Shellman *v.* Scott, Charlt. R. M. 380; Albany City Bank *v.* Schermerhorn, Clarke Ch. 308; Attorney General *v.* Oakland etc., Walk. Mich. 90; Orr *v.* Littlefield, 1 Woodb. & M. 13; Linton *v.* Denham, 6 Fla. 533; Hoagland *v.* Titus, 1 McCart. 81; Holt

cretion be exercised where fraud is the *gravamen* of the bill,[1] or where it is apparent to the court that a dissolution of the injunction would result in greater injury and hardship than its continuance to the hearing,[2] or where it is apparent that, by the dissolution, complainant would lose all the benefit which would otherwise accrue to him should he finally succeed in his cause.[3]

§ 900. In the exercise of this discretion, a dissolution will not be allowed where auxiliary evidence of complainant's right is before the court, sufficient to sustain the bill, even though its material averments be denied by the answer.[4] And where the facts and entire history of the case, as disclosed by bill and answer, afford strong presumption that complainant will establish his claim for relief upon the hearing, and that he might in the meantime suffer irremediable injury by the dissolution, the injunction will be retained.[5] So where the case as presented by the bill is one which seems to require investigation, and the effect of dissolving the injunction would be to place the property which is the subject of controversy beyond the control of the court in which the action is pending, and would be equivalent to a complete denial of the relief sought by the bill, the injunction will not be dissolved.[6] So, too, where the circumstances of the case, as disclosed in the answers of both of two defendants, seem to require that the injunction should be continued, it will not be dissolved upon the answers, but will be retained until the hearing.[7]

§ 901. Where it is apparent from the answer that there are still questions of doubt, on which additional light is requisite to satisfy the court before deciding the rights of the parties, a

v. Bank of Augusta, 9 Geo. 552; Dent v. Summerlin, 12 Geo. 5; Hammett v. Christie, 21 Geo. 251; New v. Bame, 10 Paige, 502.

[1] Dent v. Summerlin, 12 Geo. 5.

[2] Chetwood v. Brittan, 1 Green Ch. 438; Firmstone v. DeCamp, 2 C. E. Green, 309.

[3] Attorney General v. Oakland etc., Walk. Mich. 90.

[4] Orr v. Littlefield, 1 Woodb. & M. 13.

[5] Linton v. Denham, 6 Fla. 533.

[6] Hoagland v. Titus, 1 McCart. 81.

[7] Hammett v. Christie, 21 Geo. 251.

dissolution should not be granted, especially where the very purpose for which the relief was originally allowed was the prevention of irreparable injury.[1] Or, if a reasonable doubt exists as to whether the equity of the bill is sufficiently negatived by the answer to warrant a dissolution, it is not error for the court to refuse to dissolve the injunction and to order it to stand over that proofs may be taken.[2]

§ 902. If the continuance of the injunction, even admitting defendant's answer to be true, can not prejudice or imperil his rights, and on the other hand its dissolution might seriously impair the rights of complainant, the motion to dissolve upon the coming in of the answer should not be allowed. Thus, in the case of an injunction in aid of a creditor's bill, the answer of the defendant, denying the ownership of any property, or interests in property of any nature whatever, does not necessarily entitle him to a dissolution of the injunction restraining him from disposing of his property. In such case, if the answer be true, the injunction can work no injury to defendant, and if, notwithstanding his answer, he is possessed of property, the injunction should be continued for the protection of the creditors.[3] So where the fact is disclosed by defendants' answer that they have no substantial interest in the subject matter of the action, such interest being in a third person, not a party to the bill, and that the interests of the defendants can not be prejudiced by continuing the injunction, while complainant's rights may be seriously jeopardized, the writ will not be dissolved on such answer.[4]

§ 903. The rule that an answer fully denying the equities of the bill entitles defendant to a dissolution, must be understood as applying only to cases where the denial in the answer is explicit and direct, traversing the allegations of fact on which the writ was granted. It is not sufficient that it deny the inferences to be drawn from those facts, or deny their effect, and such an answer does not constitute sufficient ground

[1] Purnell v. Daniel, 8 Ired. Eq. 9.
[2] James v. Lemly, 2 Ired. Eq. 278; Monroe v. McIntyre, 6 Ired. Eq. 65.
[3] New v. Bame, 10 Paige, 502.
[4] James v. Norris, 4 Jones Eq. 225.

for dissolving an injunction.[1] Nor will a merely technical denial meet the requirements of the rule, especially if it is manifest from the whole case that the aid of the court is still necessary for the protection of complainants.[2]

§ 904. To entitle defendants to a dissolution, their answer must be at least credible,[3] and it must be responsive to the material allegations of the bill;[4] otherwise the injunction will be continued to the hearing. And in no event will a dissolution be allowed upon an answer not under oath, and without evidence of the truth of the facts alleged in defense.[5] So, too, the facts denied must be within the knowledge of the person denying under oath, and a mere denial upon information and belief will not suffice.[6] Thus, a denial in the answer, upon information and belief, of a notice upon which the equity of the case largely rests, is not a sufficient denial within the rule to warrant a dissolution of the injunction.[7]

§ 905. A critical examination of the cases wherein a departure has been allowed from the general rule, that defendant is entitled to a dissolution on filing his answer denying the equities of the bill, will show that in every instance the departure has been warranted by special circumstances, appealing strongly to the exercise of a sound judicial discretion, and warranting the court in retaining the injunction, notwithstanding the denial of the averments of the bill, in order that substantial justice might be done between the parties. But such discretion will not be exercised in behalf of one who has been grossly negligent in the assertion of his rights; and where complainant has been guilty of great laches, and has allowed an unreasonable length of time to elapse without taking any steps in his cause, the general rule will not be departed from,

[1] Teasey v. Baker, 4 C. E. Green, 61.
[2] Merwin v. Smith, 1 Green Ch. 182.
[3] Moore v. Hylton, 1 Dev. Eq. 433.
[4] Rich v. Thomas, 4 Jones Eq. 71.
[5] Gray v. McCance, 11 Ill. 325.
[6] Higbee v. Camden etc., 4 C. E. Green, 276; Ward v. Van Bokkelen, 1 Paige, 100.
[7] Piersen v. Ryerson, 1 Halst. Ch. 196.

and the injunction will be dissolved upon the coming in of the answer denying complainant's equities.[1]

§ 906. If the answer negative only a part of the equity of the bill, it will not suffice to warrant the court in dissolving the injunction, and under such circumstances it will usually be continued to the hearing.[2] Where, however, a discrimination can properly be made, and the injunction can be dissolved in part and retained as to the remainder, if the answer satisfactorily denies a portion of the equity of the bill, a dissolution may be allowed *pro tanto*.[3]

§ 907. Where defendant's answer is illusory, and is deficient in frankness and candor, the injunction will be retained.[4] Thus, an averment in an answer that certain material facts are substantially correct, so far as concerns the defendants, is defective both in form and substance, and is not sufficient to entitle defendants to a dissolution.[5] So if the answer makes no denial of the averments of the bill on which complainant's equity rests, but simply asserts that defendant does not believe and can not admit them, it is insufficient to warrant a dissolution.[6] And where, after the coming in of the answer, enough of the bill still remains undisputed to render it probable that complainant will sustain his claim for relief, the injunction will not be dissolved.[7] And an injunction which has been granted upon notice and affidavits of both parties, especially upon the affidavits of defendants themselves, going to the merits of the cause, will not be dissolved on answer, but will be continued to the hearing.[8]

§ 908. Where a corporation is made a defendant in equity, an answer under the corporate seal and without oath is generally sufficient for ordinary purposes, and this is the usual mode of answering by corporate bodies. But for the purposes

[1] Greenin *v.* Hoey, 1 Stockt. 137.
[2] Jackson *v.* Jones, 25 Geo. 93.
[3] Edwards *v.* Perryman, 18 Geo. 374.
[4] Little *v.* Marsh, 2 Ired. Eq. 18.
[5] Carr *v.* Weld, 3 C. E. Green, 41.
[6] Kent *v.* Ricards, 3 Md. Ch. 392.
[7] Sherrill *v.* Harrell, 1 Ired. Eq. 194.
[8] Sinnickson *v.* Johnson, 2 Green Ch. 374.

of a motion to dissolve an injunction, such an answer, verified merely by the corporate seal, is not sufficient, and the oath of some officer of the corporation, or other person acquainted with the facts alleged in the answer, is also required.[1]

III. Dissolution of Injunctions against several joint Defendants.

§ 909. The general rule.
910. Modifications of the rule.
911. Modifications of the rule.
912. Special cases.
913. Impossibility of procuring answer.
914. Greater strictness required in cases of fraud.
915. Ignorance; absence of defendant; improper joinder.

§ 909. The general rule as to the dissolution of injunctions granted against several defendants jointly, is that a dissolution will not be allowed until all the defendants implicated in the charge have fully answered, denying the equities of the bill.[2] The rule is based upon the necessity of protecting the rights of complainant by retaining the injunction until the personal knowledge of all the defendants has been tested as to the facts alleged in the bill, and until this is done, complainant has a right to insist upon the protection of the court.[3]

§ 910. It is to be noticed, however, that the rule as here stated is limited by three important modifications or exceptions. The first of these is, that complainant must have used due diligence in taking the necessary steps to expedite his cause and to procure the answers of all the defendants.[4]

[1] Fulton Bank *v.* New York etc., 1 Paige, 311; Hemphill *v.* Ruckersville Bank, 3 Geo. 435; Griffin *v.* State Bank, 17 Ala. 258.

[2] Noble *v.* Wilson, 1 Paige, 164; Smith *v.* Loomis, 1 Halst. Ch. 60; Johnston *v.* Alexander, 6 Ark. 302.

[3] Coleman *v.* Gage, Clarke Ch. 295.

[4] Mallett *v.* Weybossett Bank, 1 Barb. 217; Depeyster *v.* Graves, 2 Johns. Ch. 148; Stoutenburgh *v.* Peck, 3 Green Ch. 446; Johnston *v.* Alexander 6 Ark. 302; Noble *v.* Wilson, 1 Paige, 164.

Equity rarely, if ever, extends its protection to those who have been negligent in the assertion of their rights, and complainants who have been guilty of laches in compelling the answer of defendants, can not complain if a dissolution is allowed before the answers of all the defendants enjoined have been filed. Thus, where the answers of some of the defendants were in, and the others could have been obtained by due diligence, but complainant had neglected for a period of nine months to procure them, a dissolution was properly granted.[1]

§ 911. A second modification of the rule is, that the answer is required only of those defendants upon whom rests the *gravamen* of the charge, and where such defendants have fully answered, denying the material allegations of the bill, the injunction may be dissolved, notwithstanding other defendants have not yet answered.[2] Thus, the answer of defendants who are joined merely as formal or nominal parties to the action, will not be insisted upon, since such answer can not vary or alter the effect of the answers of the real defendants in interest, nor deprive them of their right to a dissolution upon negativing the equities of the bill.[3] So where it is apparent upon the face of the answer itself, that all the defendants who have any personal knowledge of the matters in controversy have answered, denying the allegations of the bill, and that the defendant not answering is ignorant of the facts in issue, the injunction should be dissolved.[4] Nor does it matter that the answer in such case contains new matter in addition to that in denial, provided all the material averments of the bill are clearly denied.[5] The third recognized modification of the rule

[1] Depeyster *v.* Graves, 2 Johns. Ch. 148.

[2] Higgins *v.* Woodward, Hopk. 342; Seebor *v.* Hess, 5 Paige, 85; Depeyster *v.* Graves, 2 Johns. Ch. 148; Vliet *v.* Lowmason, 1 Green Ch. 404; Stoutenburgh *v.* Peck, 3 Green Ch. 446; Mallett *v.* Weybossett Bank, 1 Barb. 217; Adams *v.* Hudson etc., 2 Stockt. 535; Heck *v.* Vollmer, 29 Md. 507; Coleman *v.* Gage, Clarke Ch. 295; Johnston *v.* Alexander, 6 Ark. 302; Fowler *v.* Williams, 20 Ark. 641; Shricker *v.* Field, 9 Iowa, 366.

[3] Higgins *v.* Woodward, Hopk. 342; Shricker *v.* Field, 9 Iowa, 366.

[4] Coleman *v.* Gage, 1 Clarke Ch. 295.

[5] Shricker *v.* Field, 9 Iowa, 366.

is, that it is applicable only to cases where the injunction was properly granted in the first instance.[1]

§ 912. If one of several defendants enjoined answers with a full denial of the material allegations contained in the bill, and another denies all knowledge, information and belief of the matters in controversy, the injunction may be dissolved, without waiting for the answer of a third defendant who can know nothing of the equities of the bill.[2] But where, upon filing a bill, an injunction is allowed against one of several defendants, it will not be dissolved upon his answer negativing complainant's equities, if the other defendants by their answers admit all the material allegations of the bill.[3] Where, however, one of the defendants files his answer, and from his own connection with the subject in controversy and of his own personal knowledge, is able to lay such facts before the court as to render it apparent that complainant has no equity, a motion to dissolve may be granted, without the answer of the other defendant.[4]

§ 913. Where from the circumstances of the case it is impossible to procure the answer of all the defendants, those who have answered, denying the equities on which the injunction rests, are entitled to a dissolution without further delay. Thus, where the defendant that has not answered is a foreign corporation, not within the jurisdiction of the court, and it is therefore impossible to compel an answer from such defendant, the absence of its answer is not sufficient ground for refusing to dissolve the injunction.[5]

§ 914. Courts of equity are usually more strict in requiring a positive denial from all the defendants before dissolving an injunction granted on the ground of fraud, than in ordinary cases. And where the bill implicates two defendants in the same charge of fraudulent conduct, the court will require the

[1] Mallett v. Weybossett Bank, 1 Barb. 217. And see Depeyster v. Graves, 2 Johns. Ch. 148; Vliett v. Lowmason, 1 Green Ch. 404.

[2] Rockwell v. Lawrence, 1 Halst. Ch. 20.

[3] Zabriskie v. Vreeland, 1 Beas. 179.

[4] Gregory v. Stillwell, 2 Halst. Ch. 51.

[5] Baltimore etc. v. Wheeling, 13 Grat. 40.

answer of both defendants before granting a motion to dissolve.[1] So where the answer of one of the defendants is not sufficiently full and satisfactory as to the acceptance and subsequent fraudulent relinquishment of a trust, which constituted one of the chief grounds on which the injunction was granted, it will not be dissolved, even though there are no other reasons for retaining it.[2] And where fraud is one of the grounds upon which the injunction was granted, a denial on the part of some of the defendants of fraud as to themselves, will not authorize a dissolution, if their title or rights may be affected by the fraud charged against the other defendants.[3]

§ 915. Mere ignorance of the subject in controversy on the part of the defendants answering the bill, and their consequent inability to deny the material averments on which its equity depends, will not warrant the court in dissolving the injunction.[4] Nor does the fact that the only defendant who can answer such allegations is absent from the state, constitute any ground of exception to the general rule, and the injunction will, under such circumstances, be retained to the hearing.[5] And on motion to dissolve an injunction against proceedings at law, the fact that a third person, not a party to the action at law, and improperly made a defendant in the injunction suit, was enjoined, will not avail the defendant seeking a dissolution.[6]

[1] Price *v.* Clevenger, 2 Green Ch. 207.
[2] Scull *v.* Reeves, 2 Green Ch. 84.
[3] Schermerhorn *v.* Merrill, 1 Barb. 511.
[4] Lines *v.* Spear, 4 Halst. Ch. 154; Councill *v.* Walton, 4 Ired. Eq. 155.
[5] Id.
[6] Tradesman's Bank *v.* Merritt, 1 Paige, 302.

IV. Dissolution of Injunctions against Proceedings at Law.

§ 916. Effect of dissolution.
917. Dissolution refused before hearing where right is founded in trust.
918. Dissolution in part.
919. Credits allowed on judgment.
920. Effect of defendant declining to answer.
921. Error to enter decree for amount of judgment on dissolution.

§ 916. The effect of a decree dissolving an injunction against the enforcement of an execution at law, is to restore the execution creditor to the same position which he occupied before the granting of the writ, and he may proceed to enforce his execution as if no injunction had been granted.[1] Nor does an appeal from such a decree operate as a stay of execution or revive the injunction, and the creditor is at liberty to proceed with the collection of his execution, notwithstanding such appeal, as if he had never been enjoined.[2]

§ 917. While no principle of the law of injunctions is better established than that he who has a good defense to an action at law, which he omits or fails to make in the legal forum, can not afterward make such defense the foundation of a bill in equity to enjoin the proceedings at law, yet where an injunction has been granted against such proceedings, it will not be dissolved before the hearing, where complainant's right to relief rests on matters of trust exclusively of equitable jurisdiction.[3] And where a suit at law has been enjoined in order that the defendant in the action might obtain relief and discovery by changing the forum of litigation, if the subject matter is peculiarly of equitable cognizance, making it proper for a court of equity to retain jurisdiction of the case, the

[1] Duckett *v.* Dalrymple, 1 Rich. Law, 143.

[2] Garrow *v.* Carpenter, 4 Stew. & P. 336; Hoyt *v.* Gelston, 13 Johns. 139; Wood *v.* Dwight, 7 Johns. Ch. 295.

[3] Quackenbush *v.* Van Riper, Saxt. 476.

injunction will not be dissolved on the coming in of the answer, denying the equities of the bill.[1]

§ 918. Injunctions granted against judgments at law may be dissolved in part and retained until a hearing as to the residue, where the circumstances of the case are such as to clearly require this course in order to promote justice and secure the rights of all parties.[2] Thus, an injunction to a judgment at law, where the answer admits a part of the judgment to have been paid, should not be made perpetual, upon a motion to dissolve, even as to the part paid, but should be continued to the hearing as to the amount admitted to be paid, and dissolved as to the residue.[3] And under the English practice, an injunction restraining several defendants from proceedings at law, may be dissolved as against some of them, before all have answered.[4]

§ 919. An injunction restraining proceedings under a judgment at law on the ground that the judgment is for an amount larger than that really due, will not be continued on defendant's allowing a credit for the amount of the excess; and the answer showing positively that the balance of the judgment is justly due, the motion to dissolve will be granted.[5] And where proceedings at law are enjoined on the ground of certain credits which have not been allowed, if the defendant admits the credits by his answer and offers to allow them, the injunction will be dissolved as to the balance justly due.[6]

§ 920. If defendant declines answering the injunction bill, he is regarded, on the motion to dissolve, as admitting its allegations. It is therefore error to dissolve an injunction against a judgment at law where the bill contains upon its face sufficient equity to warrant the writ, as where it appears that

[1] Brown v. Edsall, 1 Stockt. 256.
[2] McReynolds v. Harshaw, 2 Ired. Eq. 29.
[3] Id.
[4] Lewis v. Smith, 7 Beav. 470.
[5] Rodahan v. Driver, 23 Geo. 352.
[6] Welch v. Parran, 2 Gill, 320.

the judgment has been discharged by proceedings in bankruptcy, and defendant declines to answer.[1]

§ 921. In the absence of statutory enactment requiring such a course, it is error for a court of equity, in dissolving an injunction granted to restrain proceedings under a judgment at law, to enter a decree in favor of the plaintiff at law for the amount of the judgment enjoined, with damages and interest; the proper practice in such case is to dissolve the injunction and dismiss the bill with costs.[2]

V. Dissolution of Injunctions affecting the Title to Realty.

922. Diligence exacted of complainant.
923. Injunction retained in case of doubt.
924. Injunction against judgment for unpaid purchase money.
925. The same.
926. Special cases.

§ 922. The general rule exacting diligence from one who seeks the extraordinary aid of equity for the protection of his rights, prevails very strongly where an injunction is granted for the protection of property pending litigation concerning the right or title in dispute. And where a person has received the aid of a court of equity by injunction for the purpose of protecting him in the property in dispute, until the questions at issue shall be determined, he will not be allowed to slumber on his rights, and if he fails to exercise reasonable diligence in advancing his suit, the injunction will be dissolved.[3] Long

[1] Peatross v. McLaughlin, 6 Grat. 64.

[2] Medley v. Pannill's Adm'r., 1 Rob. Va. 63.

[3] Schalk v. Schmidt, 1 McCart. 268. That the rule, however, is not without exception is indicated by the following observations of the court: "There are exceptions to the general rule, but they will be found to consist either of cases where the party enjoined is the mere solicitor, or agent, or tenant of a party to the suit, having no rights involved in the controversy, or where the right has been already determined. Cholmondeley v. Clinton, 19 Vesey, 261; Attorney General v. Ancaster, Dick 68; Mogg v. Mogg, Ib. 670; Casamajor v. Strode, 1 Sim. & St. 381."

acquiescence on the part of a complainant in alleged acts of fraud, which constitute the foundation of his injunction, and unreasonable delay in invoking the aid of the court for the protection of his rights, will warrant the court in dissolving the injunction. Thus, where an injunction has been obtained on the ground of fraud in certain conveyances, but it appears by the answer that complainants had long been aware of the pretended fraud, and had allowed defendants to proceed without molestation, and exercise acts of ownership and mortgage the premises, the motion to dissolve will be granted.[1]

§ 923. The existence of doubt as to whether real estate is properly subject to sale under execution, constitutes sufficient ground to warrant a court in retaining an injunction against the sale. Thus, in the case of an injunction against a sheriff's sale of real property under execution, while a serious question is pending and undetermined as to whether the land is really subject to sale in satisfaction of the judgment, a motion to dissolve will not be granted, but the injunction will be continued to the hearing.[2]

§ 924. To authorize a dissolution of an injunction against a judgment for unpaid purchase money of real estate, granted on the ground of defective title, defendants in the injunction suit will be required to exhibit a good title, and complainant, having covenants of warranty from defendants, will not be compelled to accept a conveyance from a third party.[3] And where the defendant seeks a dissolution of such an injunction on the ground that the title is sufficient, he may be required to produce his title to the court, in order that it may be satisfied as to its sufficiency.[4] While the purchaser of land may properly enjoin its sale under a deed of trust securing the unpaid purchase money, where the title proves defective, yet when the defect is cured by a conveyance of the outstanding title, the injunction will be dissolved, although there are general allegations in the bill of other outstanding title which

[1] Trustees etc. *v.* Gilbert, 1 Beas. 78.
[2] Van Mater *v.* Holmes, 2 Halst. Ch. 575.
[3] Moore *v.* Cooke's Adm'rs., 4 Hayw. Tenn. 84.
[4] Moredock *v.* Williams, 1 Overt. 325.

are not supported by proof.[1] But until an actual tender of a good and sufficient conveyance, the injunction should not be dissolved, and if dissolved before vendor has given such conveyance, it may be reinstated.[2]

§ 925. While the authorities are conflicting as to the right of a purchaser of real estate, with covenants of general warranty, to enjoin a judgment for unpaid purchase money on account of defective title,[3] it would seem that if an injunction may be allowed under such circumstances the judgment will not be perpetually enjoined, but only until the purchaser can prosecute his legal remedy on the covenants of warranty, and if he fails to do this within a reasonable period, the injunction will be dissolved.[4]

§ 926. An injunction granted against a railway company, to restrain it from taking possession of private property without first making payment or tender of damages for the occupancy, will not usually be dissolved on motion, but will be retained until a hearing upon the merits.[5] And where the bill on which an injunction is granted against the prosecution of an action of ejectment, charges that the conveyances on which defendant's title rests are fraudulent, the injunction will not necessarily be dissolved on the coming in of the answer, unless it fully and satisfactorily negatives the fraud, and a mere general denial is not sufficient for this purpose.[6]

[1] Lovell *v.* Chilton, 2 West Va. 410.
[2] Grantland *v.* Wight, 2 Munf. 179.
[3] See § 278, *et seq.*, *ante.*
[4] Swain *v.* Burnley, 1 Mo. 404.
[5] Ross *v.* Elizabeth etc., 1 Green Ch. 422.
[6] Roberts *v.* Anderson, 2 Johns. Ch. 202.

VI. Special Grounds of Dissolution.

§ 927. Technical errors no ground for dissolution.
928. Abuse of trust.
929. Matters of record; improper verification.
930. Writ not dissolved, *ipso facto*, on coming in of the answer.
931. Dissolution not allowed on evasive answer.
932. Effect of a dissolution obtained in other ways.
933. Injunctions in aid of bill for discovery.
934. Security; deposit.
935. Injunction not made perpetual on refusing dissolution.
936. Dissolution where principal relief sought can not be obtained.
937. Complainant estopped from reviving injunction.
938. Injunctions against taxes.
939. Irregularities in service of writ no ground for its dissolution.
940. Misrepresentation; laches.
941. Effect of moving to dissolve before answer.
942. Want of diligence in prosecuting cause.
943. Questions of law; withdrawal of writ by complainant.
944. Writ retained where sufficient equity appears in the answer.
945. Verification of bill.

§ 927. Mere technical errors or inaccuracies in matters of form, either in the bill or in the order of the court granting the injunction, will not avail a defendant on a motion to dissolve, provided the bill shows sufficient equity to entitle complainant to the writ.[1] Thus, the omission to ask for the injunction in the prayer for process, it being prayed for in the general prayer of the bill, does not constitute ground for a dissolution, even though it might have been a sufficient objection to warrant the court in refusing the injunction in the first instance.[2] And where a dissolution is sought on account of the insufficiency of the bond, the order of the court dissolving the injunction should not be made absolute in the first instance, but a reasonable time should be allowed for the

[1] Beauchamp v. Supervisors etc., 45 Ill. 274; Taylor v. Snyder, Walk. Mich. 490.

[2] Taylor v. Snyder, Walk. Mich. 490.

filing of a new bond, the injunction meanwhile remaining in force.[1]

§ 928. Where an injunction has been obtained on general allegations in the bill of an abuse of trust, which are denied by the answer, so much of the injunction as restrains defendant from any further exercise of his trust, may be dissolved, upon the ground that a general charge of abuse of trust is not sufficient to warrant the interposition of a court of equity; in such cases the specific facts relied upon should be made to appear.[2]

§ 929. If all the facts necessary for obtaining an injunction are matters of record, though not properly presented to the court on the application for the writ, and the applicant has an unquestioned right to a new injunction in case the first is dissolved, the motion for a dissolution will not be granted.[3] If, however, the allegations constituting the foundation for the relief are improperly sworn to, the injunction may be dissolved, even though the party aggrieved is entitled to a new one upon the dissolution of the first.[4]

§ 930. A preliminary injunction, granted until the coming in of the answer, is not dissolved, *ipso facto*, by the coming in of the answer, but requires an order for that purpose.[5] It is held, however, that no motion to dissolve is necessary in such a case.[6] But on its being satisfactorily made to appear to a court of equity that an injunction has been irregularly and improperly dissolved, it will be revived.[7] And it may be said generally, that courts of equity are always open to reinstate as well as to grant injunctions.[8]. But the fact that an indictment for forgery has been found upon the answer on which a disso-

[1] Beauchamp *v.* Supervisors etc., 45 Ill. 274; Gamble *v.* Campbell, 6 Fla. 347.

[2] Cooper *v.* Cooper, 1 Halst. Ch. 9.

[3] Campbell *v.* His Creditors, 8 La. 71.

[4] Reboul's Heirs *v.* Behrens, 5 La. 79; Catlett *v.* McDonald, 13 La. 44.

[5] Turner *v.* Scott, 5 Rand. 332.

[6] Beal *v.* Gibson, 4 Hen. & M. 481.

[7] Billingslea *v.* Gilbert, 1 Bland, 566. And see Beal *v.* Gibson, 4 Hen. & M. 481.

[8] Radford's Ex'rs. *v.* Innes' Executrix, 1 Hen. & M. 8.

lution was allowed, does not constitute sufficient ground for reviving the injunction.[1]

§ 931. An injunction will not be dissolved upon an answer which is evasive as to the material allegations of the bill. Thus, in the case of an injunction restraining defendant from removing his property beyond the limits of the state, if defendant answers evasively as to his intention to remove his property, and also evades the allegation of his insolvency, which was one of the grounds for granting the relief, the injunction will not be dissolved, especially if defendant bases his rights upon a doubtful question of law; in such a case it is the duty of the court to continue the writ until a hearing upon the merits.[2]

§ 932. The same effect which would attend a formal dissolution may sometimes be reached in other ways. Thus, a decree for the payment of money, which had been enjoined in the hands of one who was a party to the action, has the same effect as a dissolution, and practically works a dissolution, although no formal order of the court has been made dissolving the injunction.[3] And where a cause is removed from a state court to the courts of the United States, under the act of congress,[4] any injunction issued before such removal, is dissolved, *ipso facto*, and no motion for its dissolution is necessary.[5] So where one has obtained an injunction until answer or further order of the court, he being sole complainant in the bill, and he afterward amends the bill by joining another person as co-complainant, such an amendment operates as a dissolution.[6]

§ 933. Injunctions granted merely for purposes of discovery and in aid of a defense at law, are usually dissolved upon the filing of the answer. Such injunctions, being merely auxiliary in their nature, and only intended to stay proceedings until a

[1] Clapham *v.* White, 8. Ves. 35.
[2] Wilson *v.* Mace, 2 Jones Eq. 5.
[3] Crook's Ex'r. *v.* Turpin, 10 B. Mon. 243.
[4] 1 Statutes at Large, 79.
[5] McLeod *v.* Duncan, 5 McLean, 342; Hatch *v.* Chicago etc., 6 Blatch. 105.
[6] Attorney General *v.* Marsh, 16 Sim. 572.

discovery is obtained, when this object is accomplished no necessity exists for their further retention, and they are accordingly dissolved on the coming in of the answer.[1] Thus, in the case of an injunction restraining legal proceedings, on a bill for discovery and in aid of a defense at law, defendant's answer denying the allegations of the bill as to those matters concerning which the discovery is sought, and making no discovery, the injunction will be dissolved.[2] And it has been held that defendant in such a case is entitled to a dissolution, regardless of whether his answer admits or denies the facts charged in the bill.[3]

§ 934. The fact of defendant in an injunction suit having given security to perform and abide by the decree of a court of another state, in a suit between the same parties and involving the same subject matter, will not of itself warrant a dissolution, unless defendant gives security for the payment of the debt which he admits to be due.[4] But where a deposit is made by way of security for costs on obtaining an injunction, as is required in many of the states, the right to the money deposited can not be decided until the final hearing, and defendant is not entitled to it immediately upon a dissolution of the injunction on bill and answer.[5]

§ 935. Upon overruling a motion to dissolve, the court will not usually make the injunction perpetual, since the defendant still has a right to be heard upon the merits.[6] A decree making an injunction perpetual can only be rendered upon a bill *pro confesso*, upon overruling a demurrer to the bill, or upon a hearing on the bill, answer, exhibits and proofs.[7] And after an injunction bill has been taken *pro confesso* for want of an answer, a motion will not be entertained on behalf of

[1] King v. Clark, 3 Paige, 76; Grafton v. Brady, 3 Halst. Ch. 79.
[2] Grafton v. Brady, 3 Halst. Ch. 79.
[3] King v. Clark, 3 Paige, 76.
[4] McKim v. Fulton, 1 Overt. 288.
[5] Leggett v. Dubois, 1 Paige, 574.
[6] Ottawa v. Walker, 21 Ill. 610.
[7] Id.

defendant for a dissolution of the injunction as having been improperly granted.[1]

§ 936. An injunction which is merely ancillary to the main purpose of the bill, will be dissolved where the principal relief sought can not be obtained. Thus, where the bill seeks the specific performance of a contract, and an injunction is granted as auxiliary to this purpose, if it appears that the contract is not concluded or certain in all its parts, so that it can be specifically enforced, the injunction will be dissolved for want of equity in the bill.[2]

§ 937. While, as we have already seen, the jurisdiction of equity for renewing or reviving injunctions improperly dissolved is freely exercised, yet complainant may, by his own acts, be estopped from receiving the aid of a court to restore an injunction upon the grounds on which it was originally granted. Thus, where the dissolution is had without the authority or consent of complainant, but is afterward recognized and acted upon by him, the writ will not be renewed, unless upon new and special reasons being shown for the exercise of the jurisdiction, which did not exist when the injunction was originally granted, or when it was dissolved.[3]

§ 938. While there is much conflict of authority as to the right of injunction against an illegal or unauthorized tax, yet if the writ has been granted, it will be dissolved upon the tax being legalized by legislative authority. And where a perpetual injunction is granted to restrain the payment of a bounty voted by a town meeting to drafted men or their substitutes for the military service, it may be dissolved after the passage by the legislature of an act legalizing the bounty.[4]

§ 939. Mere irregularities in the service of an injunction constitute no ground for its dissolution, since it is sufficient that defendant is apprised of its existence. Thus, the fact that the writ was served upon defendant beyond the jurisdiction of the court, and in a manner different from the usual and

[1] Turpin v. Jefferson, 4 Hen. & M. 483.
[2] McKibbin v. Brown, 1 McCart. 13.
[3] Livingston v. Gibbons, 5 Johns. Ch. 250.
[4] Bartholomew v. Harwinton, 33 Conn. 408.

settled practice, is not sufficient reason for a dissolution.[1] And upon a motion to dissolve on the ground of defective service, the sheriff's return is conclusive, and the court will not allow it to be contradicted by affidavit, unless fraud or collusion is shown.[2] Nor will any informality in the service of notice of the motion for a preliminary injunction avail defendants upon a motion to dissolve upon the coming in of the answer, since, in conformity with the general principles of pleadings, such informality is waived by the appearance and answer of defendants.[3]

§ 940. Where the material matters which were relied upon in obtaining an injunction, are contradicted by the records of the court, and the injunction was obtained on a misrepresentation of the facts, it will be dissolved regardless of whether such misrepresentation occurred through inadvertence, misinformation or otherwise.[4] But where it is sought to dissolve an injunction on account of delay and laches on the part of complainant, if the delay has been caused through inadvertence and mistake, and no evidence of willful procrastination appears, the injunction will not be dissolved.[5]

§ 941. Though a motion to dissolve a temporary injunction will not usually be entertained until after answer filed, yet if the motion is interposed before answer, it is regarded in the nature of a demurrer, by which defendant admits the truth of all the allegations relied upon as a foundation for the injunction.[6] Thus, a motion to dissolve the injunction on the ground of insufficiency in the allegations of the bill, operates as a demurrer, and admits the truth of all the facts alleged.[7]

§ 942. Want of diligence on the part of complainant in prosecuting his cause, may, as we have already seen, afford

[1] Corey v. Voorhies, 1 Green Ch. 5.
[2] Id.
[3] Brammer v. Jones, 3 Fish. 340.
[4] Endicott v. Mathis, 1 Stockt. 110.
[5] Schermehorn v. L'Espenasse, 2 Dall. 360.
[6] Titus v. Mabee, 25 Ill. 257; Jenkins v. Felton, 9 Rob. La. 200. And see Schwarz v. Sears, Harring. Mich. 440.
[7] Jenkins v. Felton, 9 Rob. La. 200.

ground for dissolving an injunction. Yet it is to be observed that the rule is applicable only where defendant is so situated that he can not expedite the cause himself. If, therefore, defendant is in such a position that he can proceed, the reason for the rule no longer exists and the rule itself falls; *cessat ratio, cessat ipsa lex.*[1] But where defendants, having no personal knowledge of the equities of the bill upon which the injunction was granted, deny them upon information and belief, complainant having neglected to make a party defendant who was personally cognizant of the facts, and who should have been joined in the bill, the injunction will be dissolved.[2]

§ 943. If the question involved on an application for a dissolution is not a question of fact, but one of law, as, for example, concerning the legal interpretation and construction to be placed upon certain mining rights, which from their nature are such that the answer can not deny the equity of the injunction, so as to bring the case within the established rule to entitle complainant to a dissolution, the motion will be refused, although the injunction may be modified to meet the exigencies of the case.[3] But the party in whose favor an injunction has been granted may at any time withdraw it, and its discontinuance depends entirely upon his pleasure.[4]

§ 944. When a proper ground for the injunction is admitted by the answer, or sufficient equity is conceded by the answer as a foundation for the writ, and there yet remains an unsettled dispute between the parties, the injunction will not be dissolved, but will be continued until the hearing or further order of the court.[5] Nor is the plea of the statute of limitations, in the answer, sufficient cause to entitle defendant to a dissolution.[6]

§ 945. While the verification of an injunction bill by the oath of complainant, or other person cognizant of the facts, is

[1] Schermerhorn *v.* Merrill, 1 Barb. 511.
[2] De Groot *v.* Wright, 3 Halst. Ch. 516.
[3] Boston etc. *v.* New Jersey etc., 2 Beas. 215.
[4] Duckett *v.* Dalrymple, 1 Rich. Law, 143.
[5] Chase *v.* Manhardt, 1 Bland, 333.
[6] Hutchins *v.* Hope, 12 Gill & J. 245.

yet if there are several complainants, the oath will suffice. It follows, therefore, that an dissolved on the ground that one only has sworn to the truth of the aver- the oath of any one of several joint ufficient to meet the requirements of the

phill v. Ruckersville Bank, 3 Geo. 435.

CHAPTER XXI.

OF THE BOND AND REMEDY THEREON.

I. Of the Bond in general.
II. Remedy upon the Bond.
III. Damages.

I. Of the Bond in general.

§ 946. Object and purpose of the bond.
947. Discretion of the court in the absence of statute.
948. Order ineffectual until bond is given; bond operative from time of filing.
949. Insufficiency of bond.
950. Extent of liability.
951. Consideration; condition broken by dissolution in part.
952. New bond, when required.
953. Liabilities of sureties.
954. Liabilities of sureties.

§ 946. The complainant in an injunction suit is usually required, as a condition precedent to obtaining an interlocutory injunction, to file a bond, with sufficient sureties, conditioned for the payment to defendant of all costs and damages that may accrue to him in the event of the injunction being improperly issued. These bonds being regulated by statute, differ in the different states, their general purpose and object, however, being everywhere the same, viz., to protect defendant from any wrongful interference with his rights, and to reimburse him for all damages and costs incurred by reason of an injunction improperly issued.

§ 947. In the absence of any statute prescribing the conditions of an injunction bond, it rests in the discretion of the

court to fix the terms upon which the relief may be granted, and where complainant gives such bond as is required by the court, and fails to prosecute his suit successfully, he is liable for all damages sustained by reason of the injunction.[1] And it has been held that where complainant's right is clear and the infraction of that right is satisfactorily established, no security need be required to protect defendant against such damages as may be incurred by reason of the injunction.[2]

§ 948. An order for an injunction is considered ineffectual until the required bond is executed, and it has even been held that the order need not be regarded until the security is given.[3] The bond becomes operative and the obligation thereunder attaches from the time of filing it with the proper officer of the court.[4] And the protection afforded by the bond extends to all defendants in the injunction suit, regardless of whether they were served with process, provided they conform to the requirements of the injunction.[5]

§ 949. Insufficiency of the bond does not of itself constitute ground for a dissolution of the injunction in the first instance, but a reasonable time should be allowed for filing a new bond, the injunction meanwhile continuing in force.[6] Indeed, a motion to dissolve based upon the inadequacy of the bond, would seem to be not well founded, where there is no suggestion that complainant is insolvent and unable to respond individually in damages, since it is always competent for the court to require additional security.[7] And where the writ is properly granted in other respects, it will not be reversed because the bond is for an insufficient sum, if the defendant is not injured thereby.[8] Nor is the bond vitiated by the insertion of conditions which, though not required by law, are

[1] Newell v. Partee, 10 Humph. 325.
[2] Dodd v. Flavell, 2 C. E. Green, 255.
[3] Pell v. Lander, 8 B. Mon. 554.
[4] Lothrop v. Southworth, 5 Mich. 436.
[5] Cumberland etc. v. Hoffman etc., 39 Barb. 16.
[6] Beauchamp v. Supervisors etc., 45 Ill. 274; Gamble v. Campbell, 6 Fla. 347.
[7] Crawford v. Paine, 19 Iowa, 172.
[8] Drake v. Phillips, 40 Ill. 388.

nevertheless not contrary to law, such conditions being regarded merely as surplusage.[1]

§ 950. Where the bond is conditioned for the payment of the judgment enjoined, the obligors will be held liable at law for this amount, although complainant may have been so far justified in resorting to equity as to preclude a decree against him for damages upon dissolving the injunction.[2] But where the purpose of the injunction is merely to restrain the sale of a specific article of property under execution, a bond given by one not a party to the judgment is considered in equity only as a security to the obligee for such injury as may actually accrue, and not for the whole amount of the debt, even though it be so conditioned.[3]

§ 951. The suspension and delay occasioned by an injunction are considered as a sufficient consideration, *prima facie*, for the bond.[4] And it is held that the condition of the bond is broken by a dissolution of the injunction in part, as well as by a total dissolution, so that a right of action may accrue, although the writ has not been wholly dissolved.[5] And in an action upon the bond, the court will not examine the grounds on which the injunction was awarded, and will not inquire whether the writ was properly or improperly issued.[6]

§ 952. In continuing an injunction, a court of equity may require additional security, or a bond with new and enlarged conditions. And it may order the new bond to be given in place of the old and as a substitute for it, and the old bond may thereby be discharged without the consent of the obligee.[7] But if the order of the court be not substantially complied with, as where by mistake of the clerk the new bond is conditioned merely for the payment of the costs, the former bond is not discharged.[8]

[1] Johnson *v.* Vaughan, 9 B. Mon. 217.
[2] Hunt *v.* Scobie, 6 B. Mon. 469.
[3] Hanley *v.* Wallace, 8 B. Mon. 184.
[4] Mahan *v.* Tydings, 10 B. Mon. 351.
[5] White *v.* Clay's Exr's., 7 Leigh, 68.
[6] Dowling *v.* Polack, 18 Cal. 625.
[7] Kent *v.* Bierce, 6 Ohio, 336.
[8] Kent *v.* Bierce, 7 Ohio, 2d part, 209.

§ 953. The sureties in an injunction bond are estopped from denying that the injunction recited in the bond was granted.[1] Nor can they, in an action upon the bond, plead that an execution was sued out on the judgment enjoined, and satisfied by a levy before final decree in the injunction suit.[2] And where the sureties are bound for the performance of such final decree as may be rendered against their principal, on the death of the complainant and the revival of the cause by his administrator they are equally bound for the satisfaction of whatever decree may be rendered against him.[3]

§ 954. The contract of a surety upon an injunction bond is within the statute of frauds and is to be strictly construed; parol evidence is therefore not admissible to add to, vary, or contradict it in any of its terms.[4] And while it has been held that a misrecital in the condition of the bond as to the amount of the judgment enjoined may be corrected by the bill, where the bond contains a plain reference to the bill, upon the principle of *id certum est quod certum reddi potest*,[5] yet the better doctrine seems to be that the liability of the surety is strictly limited to his undertaking, and that such misrecital can not be corrected.[6]

[1] Fowler v. Scott, 11 Ark. 675.
[2] Id.
[3] Id.
[4] Williamson's Adm'rs. v. Hall, 1 Ohio St. 190.
[5] Id.
[6] Hall v. Williamson's Adm'rs. 9 Ohio St. 17.

II. Remedy upon the Bond.

§ 955. Remedy at common law.
956. When right of action accrues; parties.
957. Right of recovery co-extensive with conditions of bond.
958. Defendant's election on dissolution of injunction against judgment.
959. Obligors not allowed to defend on ground of equity of the injunction, or solvency of principal.
960. No right of action until writ issues; effect of conditions.
961. Effect of want of jurisdiction in court granting the injunction.

§ 955. Some conflict of authority exists as to whether a defendant in an injunction suit may, by an action on the case, recover damages for having been enjoined without cause, and the rule has been broadly stated that no such right of action exists, and that his only remedy is by suit upon the injunction bond.[1] The better doctrine, however, seems to be that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action on the case will lie.[2] But to support such action, the plaintiff's pleadings must clearly negative the existence of probable cause for the injunction; it will not suffice to allege that the writ was unjustly and wrongfully sued out, but there must be distinct allegations of a want of probable cause.[3]

§ 956. Upon the dissolution of an injunction and failure on the part of the obligors to comply with the conditions of the bond, a right of action at once accrues.[4] Nor is it necessary that the obligee should first sue out an execution upon the decree dissolving the injunction, before instituting proceedings at law for a recovery upon the bond, but he may proceed immediately upon the dissolution.[5] The action is properly

[1] Gorton v. Brown, 27 Ill. 489.
[2] Cox v. Taylor's Adm'r., 10 B. Mon. 17.
[3] Id.
[4] Tallahassee etc. v. Hayward, 4 Fla. 411; Sizer v. Anthony, 22 Ark. 465.
[5] Sizer v. Anthony, 22 Ark. 465.

brought in the name of all the joint obligees, although it be in fact only for an injury or loss occasioned to one of them.[1]

§ 957. The right of recovery upon the dissolution of an injunction, may be said to be co-extensive with the conditions of the bond upon which the writ issued, and resort must be had to that in determining the extent of the liability. Thus, in the case of an injunction restraining proceedings under a judgment, though the statute requires a bond conditioned for the payment of the judgment, as well as damages and costs, yet if in fact the bond was taken for damages and costs only, the sureties will not be held beyond that for the amount of the judgment itself.[2]

§ 958. Upon the dissolution of an injunction to a judgment at law, the party enjoined may, at his option, proceed with his judgment and execution, or may follow his remedy upon the injunction bond, and if he elects to proceed with the judgment, it has been held that he thereby waives all remedy against the sureties in the bond.[3] But where an injunction has been dissolved and afterward reinstated, no action will lie upon the bond as for a breach of its conditions, since the new injunction is regarded as but a continuation of the same cause.[4]

§ 959. In an action upon a bond conditioned for the payment of the judgment enjoined, the obligors in the bond will not be allowed to defend on the ground that complainant had sufficient equitable grounds for obtaining his injunction.[5] Nor does the fact that the principal in the bond is solvent and perfectly able to meet his liabilities, constitute any defense, in mitigation of damages or otherwise, to an action against the sureties in the bond.[6]

§ 960. Until the writ of injunction is issued and the defendant is actually restrained thereby, no cause of action

[1] Watts v. Sanders, 10 B. Mon. 372.
[2] Ashby v. Tureman, 3 Lit. 6; Ferguson v. Tipton, 1 B. Mon. 28.
[3] Porteous v. Snipes, 1 Bay, 215.
[4] Bentley v. Joslin, Hemp. 218.
[5] Hughes' Adm'r. v. Wickliffe, 11 B. Mon. 202.
[6] Hunt v. Burton, Adm'r., 18 Ark. 188.

can exist on the bond, although it has been duly approved and filed.[1] And where an injunction is ordered, but not yet issued, upon condition of complainant giving bond with sufficient security, with which condition he fails to comply, it is error to decree damages against him as upon a dissolution.[2] Nor can there be any recovery upon a bond conditioned that complainant will prosecute the injunction suit with effect, in a case where, at the time of filing the bill, there was sufficient ground for the injunction, which is afterward removed by curing a defect in title and the injunction is dissolved, since complainant is regarded in such case as having prosecuted his action with effect.[3]

§ 961. Want of jurisdiction in the court or officer granting an injunction, constitutes no valid defense to an action upon the bond after a dissolution.[4] And where an injunction has been allowed to restrain proceedings under a judgment, while the want of jurisdiction in the court granting the writ may render the obligation void as a statutory bond, it will still be held good as a common law obligation, the obligor having voluntarily given the undertaking and delayed the enforcement of the judgment.[5]

[1] Eakle v. Smith, 27 Md. 467.
[2] McCoun v. Delany, 2 Bibb, 440.
[3] Watts v. Sanders, 10 B. Mon. 372.
[4] Hanna v. McKenzie, 5 B. Mon. 314; Stevenson v. Miller, 2 Lit. 306.
[5] Hanna v. McKenzie, 5 B. Mon. 314.

III. Damages.

§ 962. General power of court of equity as to ascertaining damages.
963. Limit as to damages; construction of bond.
964. Direct damages only allowed.
965. Limitations upon amount of damages.
966. Rule as to estimating damages and interest.
967. Expense of procuring dissolution; hindrance in collection of debt.
968. Percentage on judgments enjoined.
969. Order of dissolution necessarily implies damages.
970. Damages on dissolution of injunction to judgment.
971. Sales of property, rule as to damages.
972. Injunction against suit on promissory note.
973. Counsel fees, rule as to allowing.
974. Limitations upon the rule.
975. Defendant entitled to damages, though not served with process.
976. Sale under decree in foreclosure, rule as to emblements.
977. Practice in United States courts.
978. Sureties not liable for amount of judgment; misrecital.
979. Amount of judgments not included in damages.
980. Rule where injunction was rightfully obtained.
981. Action on bond will not lie until final determination of cause.

§ 962. Independent of statutory enactments, a court of equity has the power upon the dissolution of an injunction to ascertain, by reference to a master, or otherwise, the amount of damages caused to defendant by the injunction, and to decree payment of this amount. Such a proceeding is entirely independent of and distinct from any action which may be brought upon the bond, the rights under the decree being regarded as cumulative only, and not impairing in any way the remedy upon the bond itself.[1] And in decreeing damages

[1] Sturgis v. Knapp, 33 Vt. 486; Edwards v. Pope, 3 Scam. 465; Roberts v. Dust, 4 Ohio St. 502. But see, *contra*, Phelps v. Foster, 18 Ill. 309. In this case Caton, J., delivering the opinion of the court, says: "I have, with considerable reluctance, come to the conclusion that the court exceeded its power in awarding damages to the defendant and against the complainant. Except in the case of an injunction to restrain a judgment at law, I can find no warrant in the statute for awarding damages upon the

upon a dissolution the precise amount should be specified, and it is error to award the damages in gross.[1]

§ 963. Where the practice prevails of decreeing damages upon the dissolution, it is held that the court can not go beyond the bond and award greater damages than the penalty therein fixed.[2] And when a court of equity has awarded damages upon dissolving an injunction, its decree is held to be conclusive as to the amount which can be recovered in an action upon the bond. In such action the surety is bound by the decree, and will not be permitted to show in defense that less damages were sustained than the amount awarded by the decree, since this would re-open the whole subject matter of the decree.[3] And if the damages to the different parties against whom the injunction issued are several and distinct in their nature, the bond will be held to be a several obligation, although its language might be construed to cover merely an obligation to the defendants jointly.[4]

§ 964. In estimating damages sustained by the improper issuing of an injunction, courts proceed upon equitable grounds, and while it is difficult to fix any precise rule or standard for determining the damages upon dissolution, it may be said generally that nothing will be allowed which is not the actual, natural and proximate result of the wrong committed.[5] And where no damages have been actually incurred,

dismissal of an injunction bill, and I can not find authority for sustaining it in the practice of the English Court of Chancery. The general principles of equity jurisdiction are against it. It is granting affirmative relief to the defendant, without a cross bill, and when the pleadings do not justify it. I regret that it is so, for I think this power almost indispensable as a check upon the too free and dangerous use of this writ, which is liable to great abuse, unless the greatest circumspection is used by those invested with the high power of awarding it, which, I regret to say, has not always been the case."

[1] White's Ex'rs. v. Guthrie, 1 J. J. Marsh. 503; Stagner v. Fox, Ib. 556; Ward v. Davidson, 2 J. J. Marsh. 443; Booth v. Rogers, Ib. 516.

[2] Sturgis v. Knapp, 33 Vt. 486.

[3] Lothrop v. Southworth, 5 Mich. 436.

[4] Sturgis v. Knapp, 33 Vt. 486.

[5] Collins v. Sinclair, 51 Ill. 328; Brown v. Jones, 5 Nev. 374.

none should be assessed.[1] In other words, the liability upon the injunction bond is limited to such damages as arise from the suspension or invasion of vested legal rights by the injunction. Speculative and remote damages are not properly allowable, nor are those which are merely consequential, the limit being such damages as flow directly from the injunction as its immediate consequence.[2] Thus, remote and contingent benefits that might have accrued from the increased value of property resulting from the opening of a street, which has been enjoined, will not be taken into account in an action upon the bond.[3] And the only damages which can be recovered are such as arise from the operation of the injunction itself, and not such as are occasioned by the suit independent of the injunction.[4] But where an injunction operates to delay the sale of property, real and personal, and pending such delay great depreciation occurs in the value of the property, such loss, being regarded as occasioned by the injunction, may be properly included in estimating the damages incurred.[5]

§ 965. In a suit upon the injunction bond, the recovery for costs and expenses incurred by reason of the injunction, is limited to such as accrued between the time of the issuing of the writ and the time of its dissolution,[6] and no damages are allowed during the pendency of an appeal to a higher court.[7] And where a judgment at law has been enjoined, the judgment creditor is entitled upon dissolution to damages only on so much of his judgment as remained due, and the collection of which was delayed by the injunction.[8]

§ 966. In estimating damages after the dissolution of an injunction against a judgment, they should be computed upon the aggregate amount of principal, interest and costs due at

[1] Uhrig v. St. Louis, 47 Mo. 528.

[2] Steuart v. State, 20 Md. 97; Morgan v. Negley, 53 Pa. St. 153. And see Brown v. Jones, 5 Nev. 374; Collins v. Sinclair, 51 Ill. 328.

[3] Steuart v. State, 20 Md. 97.

[4] Burgen v. Sharer, 14 B. Mon. 497.

[5] Meysenburg v. Schlieper, 48 Mo. 426, second edition, 399.

[6] Wallis v. Dilley, 7 Md. 237.

[7] Woodson v. Johns, 3 Munf. 230; Jeter v. Langhorn, 5 Grat. 193.

[8] Southerland v. Crawford, 2 J. J. Marsh. 370.

the time the injunction took effect.[1] And interest upon the amount of the judgment during the time it was enjoined, or upon the whole sum, the collection of which was suspended by injunction, is allowable.[2] But after the dissolution of an injunction to a judgment at law, the judgment creditor will not, in an action upon the bond, be allowed interest on the amount of the judgment, if it has been fully satisfied.[3] Where, however, payment of money justly due has been enjoined, interest is recoverable as a matter of right up to the time of payment into court on dissolution of the injunction.[4]

§ 967. In assessing damages in an action upon the injunction bond, a reasonable sum may be allowed for expense and trouble incurred in procuring a dissolution.[5] And where one has been frustrated and hindered in the collection of his debt by the wrongful suing out of an injunction against his execution, the surety in the bond is liable for damages thereby incurred, not exceeding the penalty named in the bond.[6]

§ 968. Where, as in some of the states, it is provided by statute that a certain percentage of judgments enjoined shall be assessed as damages on the dissolution, one not a party to the judgment, but who enjoins proceedings under it, is liable for the percentage as if he were a party.[7] It is held, however, that statutes allowing such a percentage of damages upon the dissolution of an injunction to a judgment at law, are to be construed strictly as applicable to judgments alone, and not as including injunctions to decrees in chancery.[8]

§ 969. The payment of damages is considered as a penalty for failure to sustain an injunction, and it is held that the order of dissolution necessarily imports that the damages are to be paid, unless it expressly remits them.[9] And where the

[1] Washington's Ex'r. v. Parks, 6 Leigh, 581.
[2] Gist v. McGuire, 4 Har. & J. 9; Aldrich v. Reynolds, 1 Barb. Ch. 613.
[3] Grundy v. Young, 2 Cranch C. C. 114.
[4] Wallis v. Dilley, 7 Md. 237.
[5] Pargoud v. Morgan, 2 La. 100.
[6] Day v. Martin, 7 La. 365.
[7] Claytor v. Anthony, 15 Grat. 518.
[8] Head v. Perry, 1 Monr. 253; Martin v. Wade's Ex'rs., 5 Monr. 77.
[9] Claytor v. Anthony, 15 Grat. 518.

bond is conditioned for the payment of such damages as the court may award, and the court simply dissolves the injunction and dismisses the bill without decreeing any damages, the order of dissolution necessarily implies that the damages must be paid.[1] So a bond conditioned for the payment of such costs and damages as may be awarded against complainant in case the injunction is dissolved, authorizes a recovery of the damages and costs incurred, whether awarded upon the dissolution, or afterward, or in a different proceeding.[2]

§ 970. Damages on the dissolution of an injunction against a judgment at law form, as to the party obtaining the injunction, a part of the judgment, and are embraced within its lien.[3] And in computing damages upon the dissolution of an injunction, the taxable costs of so much of the proceedings in the injunction suit as were necessary to procure the dissolution may properly be included.[4] But a statute providing that upon the dissolution of an injunction the court shall immediately enter up judgment against the sureties as well as the principal, is unconstitutional and void.[5]

§ 971. An injunction against the sale of property under a deed of trust, is not necessarily a proceeding restraining the collection of money, and damages in such case are not to be estimated under a statute prescribing a fixed rate of damages on the dissolution of injunctions restraining the payment of money, but they should be computed according to the degree of injury actually sustained.[6] In all such cases the amount of injury should be determined by proper evidence, taking into consideration the probable amount that might have been realized had the sale not been enjoined, the value of money at

[1] Claytor v. Anthony, 15 Grat. 518. But see Ashby v. Chambers, 3 Dana, 437, where it is held that there can be no recovery upon an injunction bond conditioned for the payment of such damages as shall be awarded, where none have been decreed upon the dissolution of the injunction.

[2] Hibbard v. McKindley, 28 Ill. 240; Brown v. Gorton, 31 Ill. 416; Edwards v. Edwards, Ib. 474.

[3] Michaux's Adm'r. v. Brown, 10 Grat. 612.

[4] Aldrich v. Reynolds, 1 Barb. Ch. 613.

[5] Hughes v. Hughes' Adm'r., 4 Monr. 43.

[6] Kennedy's Adm'x. v. Hammond, 16 Mo. 341.

the time, and such other circumstances as tend to show the actual damages sustained.[1] But it is improper to allow the difference in the value of United States treasury notes at the time of granting and of dissolving the injunction, as compared with the market value of gold coin.[2]

§ 972. Upon the dissolution of an injunction to an action at law on a promissory note, the bond being conditioned for the payment of all damages which may result to the party enjoined by reason of the injunction, plaintiffs should be allowed their taxable costs during the time they were delayed by the injunction, both in the action at law and the suit in equity, provided such costs can not be realized from the parties prosecuting the injunction suit.[3]

§ 973. A reasonable amount of compensation paid as counsel fees in procuring the dissolution of an injunction, may be recovered in an action upon the bond, if the injunction was improperly or wrongfully sued out, the amount being limited to fees paid counsel for procuring the dissolution, and not for defending the entire case. Counsel fees in such cases are regarded as a proper subject of consideration in estimating the damages incurred, the loss being as direct and immediate as any other.[4] And under a statute requiring the court, after dissolving an injunction, upon a suggestion of damages being filed by the injured party, to assess the damages sustained by reason of the injunction, it is not error to include counsel fees for defending the injunction suit.[5]

§ 974. While a reasonable compensation as counsel fees in procuring the dissolution may be allowed and recovered in an action upon the bond, it is improper to include fees paid to

[1] St. Louis *v.* Alexander, 23 Mo. 483.

[2] Riddlesbarger *v.* McDaniel, 38 Mo. 138.

[3] Derry Bank *v.* Heath, 45 N. H. 524.

[4] Behrens *v.* McKenzie, 23 Iowa, 333; Edwards *v.* Bodine, 11 Paige, 224, Coates *v.* Coates, 1 Duer, 664; Corcoran *v.* Judson, 24 N. Y. 106; Aldrich *v.* Reynolds, 1 Barb. Ch. 613; Ah Thaie *v.* Quan Wan, 3 Cal. 216; Prader *v.* Grim, 13 Cal. 585; Garrett *v.* Logan, 19 Ala. 344; Derry Bank *v.* Heath, 45 N. H. 524; Ryan *v.* Anderson, 25 Ill. 372; Collins *v.* Sinclair, 51 Ill. 328; McRae *v.* Brown, 12 La. An. 181; Brown *v.* Jones, 5 Nev. 374.

[5] Misner *v.* Bullard, 43 Ill. 470.

counsel for defending the entire action to which the injunction was merely ancillary.[1] And where no counsel fees have been paid, the defendant, a municipal corporation, defending by its salaried attorney without fee for his services, no counsel fees should be allowed.[2] Nor can defendant lay the foundation for larger damages by employing an unnecessary number of counsel.[3] But to warrant a court in the allowance of counsel fees for procuring a dissolution, it would seem not to be necessary that the fees should have been actually paid; it will suffice that the services have been rendered and the liability incurred.[4]

§ 975. An injunction bond being for the benefit of all the defendants enjoined, regardless of whether they are served with process, to entitle one to damages upon a dissolution, it is sufficient that he has rendered himself obedient to the injunction, though the writ may not have been served upon him, and he is then entitled to a reference to ascertain his damages.[5] Nor will the want of jurisdiction in the court over the subject matter of the action in which the injunction was granted, deprive defendant of his right to damages on the dissolution.[6]

§ 976. Where a mortgagor obtains an injunction to prevent the mortgagee from selling the premises under a decree in foreclosure, and pending the injunction the mortgagor removes emblements from the premises, the value of the emblements should be included in the damages awarded to the mortgagee upon dissolution.[7]

§ 977. The obligor in an injunction bond given in proceedings in the United States courts, will not be subjected to the laws of the state in fixing his liability upon the bond. And although the state practice permits the assessment of damages

[1] Langworthy *v.* McKelvey, 25 Iowa, 48.

[2] Uhrig *v.* St. Louis, 47 Mo. 528.

[3] Collins *v.* Sinclair, 51 Ill. 328.

[4] Garrett *v.* Logan, 19 Ala. 344; McRae *v.* Brown, 12 La. An. 181; Brown *v.* Jones, 5 Nev. 374. But see, *contra*, Willson *v.* McEvoy, 25 Cal. 169; Prader *v.* Grimm, 28 Cal. 11.

[5] Cumberland etc. *v.* Hoffman etc., 39 Barb. 16.

[6] Id.

[7] Aldrich *v.* Reynolds, 1 Barb. Ch. 613.

and entering of a decree thereon against the obligor immediately upon the dissolution of the injunction, such practice will not be recognized in the United States courts.[1]

§ 978. If the bond is conditioned that the obligor shall pay all sums of money, damages and costs that may be awarded against him in case the injunction is dissolved, the sureties are not liable for the amount of the judgment enjoined, if that be not adjudged against the obligor upon the dissolution.[2] Nor will a misrecital in the bond as to the terms of the injunction and its extent, subject the surety to payment of judgments at law, if from the injunction it appears that the collection of the judgments was not enjoined.[3]

§ 979. Where a judgment creditor is enjoined from proceeding against certain specific property claimed by a third person, a stranger to the original suit, without interfering with the remedy against other property or against the person of the debtor, who is not made a party to the bill, the court will not, on dissolving the injunction and dismissing the bill, decree the amount of the judgment as a penalty against complainants.[4] So if the injunction is dissolved only as to a portion of the property affected by the writ, which portion has not depreciated in value, and is afterward sold on execution and the proceeds of the sale are applied on the judgments, complainant should not be decreed to pay both the amount of the judgments and the penalty.[5] And where complainant enjoins the sale of his own property under executions against a third person, leaving the executions otherwise in full force as to the debtor's property, the measure of damages in an action upon the bond is the real loss actually incurred, with costs, and not the amount due on the executions.[6]

§ 980. Where an injunction is perpetuated in part, complainant should not be compelled to pay the costs, since he is

[1] Bein v. Heath, 12 How. 168.
[2] Corder v. Martin, 17 Mo. 41.
[3] Hord v. Trimble, 1 Lit. 418.
[4] Portsmouth etc. v. Byington, 12 Ohio, 114.
[5] Teaff v. Hewitt, 1 Ohio St. 511.
[6] Hord v. Trimble, 1 Lit. 418.

the prevailing party in so far as the injunction is allowed to stand, and it is error to decree costs against him.[1] And in general, wherever an injunction is rightfully obtained upon sufficient grounds, and is afterward dissolved upon the removal of those grounds, complainant should not be required to pay damages upon the dissolution, having had good cause for the injunction in the first instance.[2] Thus, where judgments for the purchase money of real estate are enjoined on the ground of defective title, and a dissolution is granted upon the title being made good, no damages should be allowed against complainant.[3]

§ 981. An injunction obtained by the plaintiff in an action at law, to preserve property *pendente lite*, being dissolved, no reference should be allowed to ascertain damages sustained by defendant by reason of the injunction until the suit at law is determined, since it can not be known until the action is determined whether the plaintiff may not recover in the action at law.[4] And it may be laid down as a general rule, that no action at law can be maintained upon the bond until the final determination of the cause in which the injunction issued, even though the injunction has been dissolved upon appeal and the cause remanded for further proceedings, since complainant is still entitled to proceed with his cause, and may on final hearing establish his right to an injunction.[5]

[1] Ross *v.* Gordon, 2 Munf. 289; Hoofman *v.* Marshall, 1 J. J. Marsh. 64.

[2] McKoy *v.* Chiles, 5 Monr. 259; Payne *v.* Wallace, 6 Monr. 381; Porter *v.* Scobie, 5 B. Mon. 387; Lampton *v.* Usher's Heirs, 7 B. Mon. 57; Fishback *v.* Williams, 3 Bibb, 342.

[3] Porter *v.* Scobie, 5 B. Mon. 387; Lampton *v.* Usher's Heirs, 7 B. Mon. 57; Fishback *v.* Williams, 3 Bibb, 342.

[4] Thompson *v.* McNair, 64 N. C. 448.

[5] Gray *v.* Veirs, 33 Md. 159.

CHAPTER XXII.

OF PRACTICE.

I. PRACTICE IN GRANTING INJUNCTIONS.
II. AMENDMENTS.
III. PRACTICE IN DISSOLVING INJUNCTIONS.

I. PRACTICE IN GRANTING INJUNCTIONS.

§ 982. Practice largely dependent upon statutes and local usage.
983. Writ usually granted on bill; may be granted on petition.
984. Verification of the bill.
985 Verification of bill by corporation.
986 Requisites of the verification.
987 When verification may be dispensed with.
988 Injunction must be specifically prayed.
989. When the writ may be granted.
990. All facts and documents must be brought to the attention of the court.
991. Introduction of affidavits in opposition to the motion.
992. Introduction of affidavits in support of the bill.
993. Notice of the application.
994. Notice of the application upon a supplemental bill.
995. Writ only allowed upon positive averments.
996. Form of the writ.

§ 982. Questions of practice connected with the granting and dissolving of injunctions are so largely regulated by statute and local usage in the different states, that but few rules of general application can be deduced from the decided cases. The most that can be attempted in this direction, is to present such leading principles as are believed to be generally recognized by courts of equity in administering relief by injunction, leaving the practitioner to be guided by local rules as to the details of practice.

§ 983. Interlocutory injunctions are generally granted upon the filing of a bill, properly verified, in which complainant sets forth the equities on which he bases his right to relief, the bill concluding with a prayer for an injunction. Where, however, a court of equity is already in possession of a cause, having jurisdiction both of the subject matter in controversy and of the parties, it may enforce obedience to its mandates by an injunction issued merely upon a petition in the cause and without the filing of a bill.[1]

§ 984. The proper verification of the bill is a matter of importance, since an injunction is seldom allowed upon other than a sworn bill. Nor will it suffice that the material facts constituting the equity on which the injunction is sought are verified by complainant upon information and belief, but they should be positively sworn to.[2] And where, upon an *ex parte* application for an interlocutory injunction, complainant states the facts on which his equities rest upon information and belief, he should present affidavits of their truth from the persons of whom his knowledge is obtained and who can swear positively to the facts.[3] An exception, however, is recognized in the case of an injunction in aid of a creditor's bill against the judgment debtor alone, no third parties being joined as defendants, and in such case it is sufficient if complainant swears upon information and belief as to the recovery of the judgment and return of execution *nulla bona*.[4] The exception rests upon the fact that the judgment and execution are matters of record, to which defendants are parties, and complainant is not required to swear positively as to the existence of the records.[5] So, too, the verification of an injunction bill in aid of a creditor's

[1] In the matter of Hemiup, 2 Paige, 316.

[2] Campbell *v.* Morrison, 7 Paige, 157; Reboul's Heirs *v.* Behrens, 5 La. 79; Catlett *v.* McDonald, 13 La. 44.

[3] Campbell *v.* Morrison, 7 Paige, 157; Bank of Orleans *v.* Skinner, 9 Paige, 305; Youngblood *v.* Schamp, 2 McCart. 42.

[4] Hamersley *v.* Wyckoff, 8 Paige, 72; Sizer *v.* Miller, 9 Paige, 605.

[5] Id.

suit may be made by the attorney who has conducted the proceedings at law.[1]

§ 985. Where an injunction is sought in behalf of a corporation, the bill is usually verified by some officer of the corporation conversant with the facts. It may, however, be verified by an attorney or other agent, without the oath of any of the regular officers of the corporation, where such officers are less acquainted with the facts constituting the foundation for the injunction than the agent or attorney.[2]

§ 986. As to the nature and requisites of the verification itself, it is held that the affidavit should be such as to submit the party to the penalties of perjury if its allegations prove untrue.[3] Nor will it suffice that the affidavit alleges that the material allegations of the bill are true on knowledge and belief,[4] or that the party verifying swears positively to the truth of the material averments, since it is still left uncertain what are the material facts.[5] Neither is it sufficient that the affiant swears that the allegations of the bill which render an injunction necessary are true, since such verification is open to the same objection of uncertainty.[6]

§ 987. While the usual course is to grant an injunction only upon a bill duly verified, it would seem that the oath of complainant or other person conversant with the facts may be dispensed with if the confidence of the court can be otherwise obtained. Thus, documentary evidence establishing complainant's equities and his right to relief, will suffice to warrant the court in granting an injunction, and such evidence may be presented by properly verified copies of private instruments, or of records, when such is the appropriate mode of proof.[7] And where the right, for the protection of which an injunc-

[1] Sizer v. Miller, 9 Paige, 605.

[2] Bank of Orleans v. Skinner, 9 Paige, 305.

[3] Reboul's Heirs v. Behrens, 5 La. 79; Catlett v. McDonald, 13 La. 44.

[4] Id.

[5] Sauvinet v. Poupono, 14 La. 87.

[6] Hebert v. Joly, 5 La. 50; Ricard's Heirs v. Hiriart, Ib. 244.

[7] Negro Charles v. Sheriff etc., 12 Md. 274; Youngblood v. Schamp, 2 McCart. 42

tion is sought, rests upon written instruments, such as promissory notes, none of which are exhibited and no reason or excuse is offered for the failure to present them, the relief will be withheld, although the bill is verified under oath.[1] And it has been held that a bill for an injunction against a judgment at law should make a transcript of the judgment an exhibit in the cause.[2]

§ 988. The bill should contain a specific prayer for an injunction, since the writ will not be granted under the general prayer for relief. And the injunction must be asked both in the prayer for relief and that for process; otherwise the bill is demurrable.[3] And though the omission of a specific prayer for the injunction is regarded as a defect in form, yet it is held error to grant the relief upon a bill thus defective.[4] But the defect may be cured by obtaining leave of the court to amend the bill by adding the necessary prayer.[5] And it is held that an injunction may be allowed upon the hearing, although not prayed for in the bill.[6]

§ 989. Interlocutory injunctions are usually granted on the bill alone, before issuing process to the defendant, the allegations of the bill being properly verified and the court being satisfied of their truth.[7] A motion for an injunction may, however, be made at any time before final decree, and for the purposes of such motion the answer of the defendant is regarded merely as an affidavit.[8] And upon the filing of an injunction bill, the defendant may at his option immediately put in his answer to prevent the issuing of the writ, and the court is bound to consider such answer and give it due weight, if filed before the application for the injunction is disposed of.[9]

[1] Nusbaum *v.* Stein, 12 Md. 315.

[2] Parsons *v.* Wilkerson, 10 Mo. 713.

[3] Lewiston etc. *v.* Franklin etc., 54 Maine, 402; Union Bank *v.* Kerr, 2 Md. Ch. 460; Wood *v.* Beadell, 3 Sim. 273.

[4] Primmer *v.* Patten, 32 Ill. 528.

[5] Jacob *v.* Hall, 12 Ves. 458; Wood *v.* Beadell, 3 Sim. 273.

[6] Reynell *v.* Sprye, 1 DeGex, M. & G. 660.

[7] Jones *v.* Magill, 1 Bland, 177.

[8] Warren etc. *v.* Clarion etc., 54 Pa. St. 28.

[9] Hall *v.* McPherson, 3 Bland, 529; Krone *v.* Krone, 27 Md. 77.

§ 990. Where a special injunction is sought, *ex parte*, complainant should state in his bill all the material facts bearing upon the subject matter in controversy, and should set out all documents having a material bearing upon the case, so far as they touch the right to the relief sought. If he fails or neglects to bring such facts or documents to the attention of the court upon the application for the injunction, the court may, on being apprised of such omission, immediately discharge the order for the writ and direct that matters be returned to their former condition, as far as may be done.[1]

§ 991. Upon a motion for a preliminary injunction, a defendant who is notified of the application, or required to show cause why the injunction should not issue, may introduce affidavits in opposition to the motion, and this regardless of whether a temporary injunction has or has not been allowed in the meantime.[2] Upon such motion the answer of one of several defendants may be received and read as an affidavit to contradict the allegations of the bill.[3] And a defendant may if he prefer, oppose the motion merely upon his affidavit and without answer.[4]

§ 992. The question of the admissibility of affidavits in support of the allegations of the bill, upon a motion for an injunction, has been much controverted, but the doctrine may now be regarded as well established that complainant is entitled to read affidavits in support of his case.[5] The rule, however, is limited to affidavits upon questions of fact in distinction from those upon questions of title, since the latter are not admissible to contradict the answer.[6] And it has been held that affidavits which are not offered until after the filing

[1] Harbottle *v.* Pooley, 20 L. T. N. S. 436.

[2] Seneca Falls *v.* Matthews, 9 Paige, 504; Kean *v.* Colt, 1 Halst. Ch. 365.

[3] Shreve *v.* Black, 3 Green Ch. 177.

[4] Baker *v.* Taylor, 2 Blatch. C. C. 82.

[5] United States *v.* Parrott, McAll. 271.

[6] United States *v.* Parrott, McAll. C. C. 271; Morphett *v.* Jones, 19 Ves. 350. See also Farmer *v.* Calvert etc. Co., 5 Chicago Legal News, 1.

of the bill or the coming in of the answer, are not admissible upon a motion for an injunction.[1]

§ 993. Where an injunction is applied for after the filing of the bill and after appearance by defendant, it is not necessary that defendant should be notified of the application merely because he has entered an appearance.[2] And where a rule of court requires notice of the application for an injunction after answer filed, such notice may be waived in the exercise of a sound judicial discretion, and the omission of the notice constitutes no ground for a dissolution.[3] Nor is the fact that the bill was not filed until after the injunction was ordered, sufficient to warrant a reversal of the order, the omission being at the most but a mere irregularity which does not affect the merits of the cause.[4]

§ 994. An injunction should not be allowed on an *ex parte* application upon a supplemental bill, affecting the rights of a party who has appeared in the cause, but due notice of the application should be given. And if in such case a temporary injunction is necessary to prevent irreparable injury before regular notice of the application can be given, a rule to show cause should be granted at the same time with the granting of the temporary injunction, which falls if the rule be not made absolute.[5] And after an injunction has been regularly dissolved on the coming in of the answer, a motion for a renewal will not be entertained on testimony subsequently taken.[6]

§ 995. An interlocutory injunction, being a harsh remedy, is only allowed upon such positive averments of complainant's equities as establish a clear *prima facie* case. And while the party seeking the injunction is not required to establish his right to relief with the same precision and certainty that are required upon a final hearing, he must in all cases allege posi-

[1] Brundred v. Paterson etc., 3 Green Ch. 294; Lessig v. Langton, Brightly, 191. But see Poor v. Carleton, 3 Sumner, 88.

[2] Buckley v. Corse, Saxt. 504.

[3] Id.

[4] Davis v. Reed, 14 Md. 152.

[5] Bloomfield v. Snowden, 2 Paige, 355.

[6] France v. France, 4 Halst. Ch. 619.

tively the facts on which he relies.[1] Mere argumentative allegations, or inferences from facts stated, will not entitle him to relief.[2] Nor will general allegations of irreparable injury suffice, where he does not state the facts upon which the allegations are based.[3]

§ 996. The form of the writ must of course vary with the particular circumstances of each case, the subject matter of the injunction, and the parties enjoined. It should contain a description of the particular acts or things concerning which defendant is enjoined, and should be an authentic notification of the mandate of the court.[4] The injunction as granted must be such as is prayed for by the bill, and it is not competent for a court of equity to grant an injunction in terms other than those contained in the prayer of the bill.[5]

II. Amendments.

§ 997. General rule as to amending injunction bill.
998. Amendment after dissolution.
999. Amendment without prejudice to existing injunction.
1000. Effect of new bill.

§ 997. While the propriety of allowing amendments to injunction bills has been said to be exceedingly questionable,[6] yet it may be regarded as an established rule that the bill may be amended, even after motion to dissolve the injunction, and if when so amended it shows sufficient cause for continuing the injunction, which is not overborne by

[1] Perkins v. Collins, 2 Green Ch. 482; Holdrege v. Gwynne, 3 C. E. Green, 26; Campbell v. Morrison, 7 Paige, 157; Bank of Orleans v. Skinner, 9 Paige, 305; Bogert v. Haight, Ib. 297; Jones v. Macon etc., 39 Geo. 138.

[2] Battle v. Stephens, 32 Geo. 25.

[3] Branch Turnpike Co. v. Supervisors, 18 Cal. 190.

[4] Whipple v. Hutchinson, 4 Blatch, 190; Summers v. Farish, 10 Cal. 347.

[5] Burdett v. Hay, 33 L. J. Ch. 41.

[6] Calderwood v. Trent, 9 Rob. La. 227.

defendant, it will be continued.[1] And it is not error to overrule a motion for a dissolution on the ground of defects in the bill, when an amended bill has been filed curing those defects and taking the place of the original without changing the cause of action.[2] The right to amend should be guarded with the utmost caution by the court, and amendments should be allowed only when the circumstances of the case indicate that the promotion of justice requires this course.[3] And in all cases the truth of the new allegations, as well as the causes requiring the amendment, should be duly verified by affidavit.[4] And amendments should never be allowed where they are obviously intended for purposes of delay.[5]

§ 998. After an injunction has been actually dissolved upon the merits, complainant may still amend his bill and obtain a new injunction upon the bill thus amended.[6] It is to be observed, however, that after a dissolution has been allowed for want of equity in the bill, the court will not entertain an application, *ex parte*, for another injunction upon an amended bill, or upon a new one supplying the equity wanting in the first, but will require notice to the defendant. Since, if complainant is willing to swear to a bill fitting the opinion of the court, defendant's rights should not be interfered with without allowing him to be first heard.[7]

§ 999. An injunction bill may be amended without prejudice to the existing injunction, by obtaining leave of court for that purpose, the amendments relating to matters existing prior to the filing of the bill.[8] And whenever, pending an

[1] Crawford *v.* Paine, 19 Iowa, 172. And see Sweatt *v.* Faville, 23 Iowa, 321. But see Rhodes *v.* Union Bank, 7 Rob. La. 63, where it is held that after the filing of a motion to dissolve, complainant will not be allowed to support his original proceedings and give effect to an injunction originally illegal, by new allegations. It is to be observed, however, that in this case the new allegations were not sworn to.

[2] Sweatt *v.* Faville, 23 Iowa, 321.

[3] Calderwood *v.* Trent, 9 Rob. La. 227.

[4] Id.

[5] Id.

[6] Buckley *v.* Corse, Saxt. 504.

[7] Hornor *v.* Leeds, 2 Stockt. 86.

[8] Walker *v.* Walker, 3 Geo. 302.

injunction, an amendment is allowed to the bill, it is without prejudice to the injunction, which still stands, although the order granting leave to amend is silent as to its effect upon the injunction.[1] But a sworn bill can not be amended by striking out material allegations, and the amendments are to be made by the addition of explanatory and supplemental statements. These should be distinctly presented to the court, properly verified under oath, with a sufficient excuse for their not having been presented in the original bill.[2]

§ 1000. While it is within the province of a court of equity to permit amendments to injunction bills, yet if complainant, instead of amending his original bill so as to sustain an injunction already granted, files what is in fact a new bill, praying for a new injunction, the court may properly dissolve the injunction upon a motion filed before the amended bill, notwithstanding such amendment.[3] And if the original bill shows no sufficient ground for the relief prayed, it can not be aided by a supplemental bill presenting matters which have arisen since the commencement of the suit, especially where such matters have no connection with the grounds of relief relied upon in the original bill.[4]

[1] Selden *v.* Vermilya, 4 Sandf. Ch. 573.
[2] Carey *v.* Smith, 11 Geo. 539.
[3] Des Moines etc. *v.* Carpenter, 27 Iowa, 487.
[4] Fahs *v.* Roberts, 54 Ill. 192.

III. Practice in dissolving Injunctions.

§ 1001 Motion to dissolve, when entertained.
1002. Notice of motion to dissolve.
1003. Defendant's answer, when excluded.
1004. Objections to sufficiency of answer.
1005. Admission of affidavits on motion to dissolve.
1006. Affidavits not allowed to take the place of answer.
1007. Distinction as to common and special injunctions.
1008. Injunctions against the infringement of patents.
1009. Introduction of affidavits as to new matter.
1010. Exception to rule excluding affidavits on motion to dissolve.
1011. Objection as to insufficient security.
1012. Practice on death of complainant.
1013. Practice on death of defendant.
1014. Continuance of motion to dissolve.
1015. Effect of sworn answer.
1016. Multifariousness of bill; improper joinder of parties.
1017. Defective verification can not be remedied on motion to dissolve
1018. Effect of exceptions to the answer.
1019. Filing of answer a waiver of objections to refusal of dissolution

§ 1001. Motions for the dissolution of interlocutory injunctions are usually made upon the coming in of the answer, which is to be taken as true in so far as it is responsive to the allegations of the bill.[1] If the injunction has been granted *ex parte*, the court will at any time hear a motion to dissolve for want of equity in the bill.[2] And where the writ has been allowed by a judge at chambers, a motion to dissolve may nevertheless be made directly to the court, without applying to the same judge.[3] Nor is it necessary that defendant should have been served with process in the cause, since, if otherwise apprised of the existence of the injunction, he may voluntarily appear and apply for a dissolution.[4]

§ 1002. A motion for a dissolution will not usually be

[1] Harris *v.* Sangston, 4 Md. Ch. 394; Merwin *v.* Smith, 1 Green Ch. 183.
[2] Receivers *v.* Biddle, 3 Green Ch. 222.
[3] Woodruff *v.* Fisher, 17 Barb. 224.
[4] Waffle *v.* Vanderheyden, 8 Paige, 45.

entertained without notice to the opposite party, and even where the right exists by statute of dissolving or vacating an injunction without notice, this should not be done unless from the urgency of the case such a course is necessary to guard against serious loss.[1] The notice should point out the particular grounds on which a dissolution is sought, and it is not sufficient to state generally that it is for irregularity in the proceedings, but it should appear in what the irregularity complained of consists.[2]

§ 1003. Where notice of the motion for a dissolution is given before answer filed, defendant will not be allowed to read his answer subsequently filed in support of the motion, since complainant, on being notified of the motion, has a right to expect that it will be heard upon the case as it then stands.[3] And upon a motion to dissolve an injunction granted against two defendants, an answer purporting to be that of both defendants, but which is in fact the answer of but one of them, and is only sworn by one, will not be admitted.[4]

§ 1004. The defendant in an injunction suit, by his motion to dissolve, plants himself upon the answer and its sufficiency, and stands pledged to sustain it, since by it he must stand or fall. And since the motion is founded on the correctness of the answer, objections of every kind may be made to its sufficiency upon the hearing of the motion to dissolve.[5] Hence it follows that exceptions to the answer will not, *per se*, prevent the dissolution of an injunction, but the court will look into the exceptions upon the argument of the motion to dissolve, and will give them the weight to which they are entitled.[6] And since, for the purposes of the motion to dissolve, such allegations of the bill as are not answered are taken

[1] Peck *v.* Yorks, 41 Barb. 547.
[2] Miller *v.* Traphagen, 2 Halst. Ch. 200.
[3] Cattell *v.* Nelson, 3 Halst. Ch. 122.
[4] Vaughn *v.* Johnson, 1 Stockt. 173.
[5] Gibson *v.* Tilton, 1 Bland, 352.
[6] Smith *v.* Thomas, 2 Dev. & Bat. Eq. 126; Edney *v.* Motz, 5 Ired. Eq. 233; Wyckoff *v.* Cochran, 3 Green Ch. 420; Jones *v.* Magill, 1 Bland, 177; Salmon *v.* Clagett, 3 Bland, 125.

as true, the fact that exceptions to the answer for insufficiency have not been acted upon, affords no ground of objection to the dissolution.[1]

§ 1005. Upon a motion to dissolve, on the coming in of the answer, complainant will not usually be allowed to file additional affidavits, either in support of his bill, or for the purpose of contradicting the answer.[2] Some exceptions to the rule are, however, recognized by the authorities, and where the effect of a dissolution would be that the parties would not remain *in statu quo* upon the final hearing, and where, as in cases of waste, serious and irreparable mischief would ensue

[1] Baltimore etc. *v.* Wheeling, 13 Grat. 40.

[2] Gentry *v.* Hamilton, 3 Ired. Eq. 376; Howell *v.* Robb, 3 Halst. Ch. 17; Eastburn *v.* Kirk, 1 Johns. Ch. 444; Roberts *v.* Anderson, 2 Johns. Ch. 202; Moredock *v.* Williams, 1 Overt. 325. Notwithstanding the decided weight of authority in support of the rule as laid down in the text, it has been strongly contended by Mr. Justice Story that the admission of affidavits upon a motion to dissolve should be left entirely to the discretion of the court. In Poor *v.* Carleton, 3 Sumner, 70, that learned jurist observes as follows: "The admission of the affidavits, whether filed before or after the answer, whether they are to the title of the plaintiff or to the acts of the defendant, although they are contradictory to the answer, ought to rest in the sound discretion of the court, according to the circumstances of each particular case, without the court's binding itself by any fixed and unalterable rules, as to the exercise of that discretion. * * * The truth seems to be, that, in cases of this sort, the practice has been shifting, from time to time, to meet the new exigencies of society and the pressure of peculiar circumstances; and the court has never suffered itself to be entrapped by its own rules, so as to interfere with the purposes of substantial justice. The practice in America has, I believe, on this subject, become more liberal than it is in England; and if it were necessary, I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived that without it irreparable mischiefs would arise. In the present case, there are circumstances which might free me from the necessity of asserting so broad a doctrine. But I wish rather to dispose of the case upon the general ground, that the granting and dissolving injunctions in cases of irreparable mischief rest in the sound discretion of the court, whether applied for before or after answer; and that affidavits may after answer be read by the plaintiff to support the injunction, as well as by the defendant to repel it, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer."

from the delay, the strictness of the rule may be relaxed.[1] But in cases of injunctions relating to partnership matters, as where one member of a firm is restrained from using the copartnership name, or doing any act relating to the business of the firm, complainant will not be allowed, on a motion to dissolve, to read *ex parte* affidavits to contradict the answer.[2]

[1] Davis's Ex'rs. *v.* Fulton, 1 Overt. 121; Moredock *v.* Williams, 1 Overt. 325.

[2] Eastburn *v.* Kirk, 1 Johns. Ch. 444. And see Roberts *v.* Anderson, 2 Johns. Ch. 202. "The general rule," says Kent, Chancellor, in Eastburn *v.* Kirk, "is against the admission of affidavits in these cases, and the instances in which they have been admitted are special, and exceptions to the general rule. Lord Kenyon, when master of the rolls, appears to have doubted the correctness of the practice in any case. They have been admitted in cases of waste, and in cases analogous, resting on the same principle, and where irreparable mischief might ensue; and I am aware that partnership cases have been brought within this rule. In one of the cases cited (2 Bro. 89), the affidavits sought to be read against the answer, were the original affidavits on which the injunction to stay waste had been founded, and which the defendant must have had an opportunity to have seen before his answer. In this case, the injunction was granted upon the filing of the bill, and the answer meets the charges; but if these affidavits are to be admitted, the defendant, on whom they must operate as a surprise, can have no opportunity to meet them; for it is well understood, in all the cases, that affidavits can not be admitted in support of the answer in this stage of the cause; and the defendant might be condemned, upon the strength of these affidavits, to a suspension of the exercise of his rights as a partner, until the hearing, without any opportunity or means of vindicating himself. This case does not strike me as very analogous to the case of waste The injunction, here, is not to restrain the defendant from committing waste, or doing a positive wrong, but from the exercise of all his rights as partner, from the apprehension that he may abuse them. The allegation of previous abuse is made, on one side, by the bill, and denied on the other, by the answer; and if the answer be full, and a denial of all equity, and of every *gravamen* in the bill, it must, upon the present motion, be taken for true. If the injunction is dissolved, the defendant may, undoubtedly, abuse his rights as a partner to the injury of his copartners; but the case does not seem to contemplate the occurrence of mischief which the law would deem irreparable, and future abuse may be the ground for further application. In the case from 9 Vesey (Berkeley *v.* Brymer, 9 Ves. 355), the chancellor refused affidavits to support an injunction to restrain the negotiation of a bill. To admit the affidavits in this case would be to authorize their admission in every other case, and would go to destroy the general rule. The motion for their admission must be denied."

§ 1006. The general rule is well established, that a motion to dissolve an injunction should be based upon defendant's answer, and that affidavits will not be allowed to take the place of the answer for the purposes of the motion.[1] Nor is it proper to introduce affidavits in support of the answer, on a motion to dissolve, where the same motion has been denied on the answer itself. If the answer in such case be deemed insufficient, the dissolution will be refused and the injunction will stand until the trial.[2] The rule as here laid down, however, is to be understood as excluding only *ex parte* affidavits, and it is held that depositions taken upon due notice, after an injunction has been sustained and the cause continued, may be read on a motion to dissolve made by defendant on an amended answer.[3]

§ 1007. A distinction as to the practice upon motions to dissolve has been taken between what are called common or ordinary injunctions, such as those to judgments at law, and special injunctions for the prevention of irreparable mischief, as in cases of waste. The distinction is based upon the fact that in cases of the latter description, the injunction is not, as in the former, in aid of or secondary to another equity, but is the very point in the case and the ultimate and only relief sought. It is accordingly held in cases of special injunctions for the prevention of irreparable injuries, that on a motion to dissolve, the bill may be read in contradiction to the answer, and if the equity appears in doubt, the motion will be refused and the injunction will be continued to the hearing.[4]

§ 1008. The same distinction has been recognized in the case of an injunction to restrain the infringement of a patent. Such an injunction is regarded as special in its nature, being

[1] Sacket *v.* Hill, 2 Mich. 182.

[2] Hoffman *v.* Livingston, 1 Johns. Ch. 211.

[3] Leroy *v.* Dickerson, 1 Carolina Law Repository, 110.

[4] Purnell *v.* Daniel, 8 Ired. Eq. 9; Troy *v.* Norment, 2 Jones, Eq. 318; Lloyd *v.* Heath, Busb. Eq. 39. And it has even been held in cases of special injunctions for the prevention of irreparable injury, that the denial in the answer of complainant's equity will not suffice to warrant a dissolution. Peterson *v.* Matthis, 3 Jones Eq. 31. But the doctrine is hardly sustained by the weight of authority.

granted upon notice to the opposite party and affidavits, and differing in this respect from the common injunction, which issues as a matter of course upon cause shown, and is usually dissolved as of course upon the coming in of the answer denying the equity of the bill. In patent cases, therefore, it is held that on motion to dissolve, the presumptions arising from the answer may be disproved by evidence on the part of complainant, and that counter testimony is then admissible to sustain the answer.[1]

§ 1009. While new matter contained in the answer, which is not responsive to any allegations of the bill, will not, as a rule, be considered upon the hearing of a motion to dissolve,[2] yet if defendant relies upon such new matter in support of his motion, complainant may be allowed to introduce affidavits for the purpose of contradicting it.[3]

§ 1010. The rule of practice excluding affidavits upon the motion to dissolve, may be departed from where it is necessary to show that the officer granting the writ was deceived as to the merits of the case. Thus, an affidavit showing that the injunction was irregularly issued, and that the officer allowing it was misled or deceived as to the facts in the case, and thereby granted the injunction contrary to law, is admissible on the hearing of a motion to dissolve.[4] And in some states the question of the admissibility of affidavits upon the motion to dissolve depends upon whether they were filed before or after the coming in of the answer. Thus, it has been held that affidavits filed by complainant before answer may be read on the motion, but if filed after answer they can not be read.[5] The practice, however, upon this subject is so dependent upon the rules of practice and the statutes of different states, that no general rule can be devised susceptible of universal application.

[1] Woodworth *v.* Rogers, 3 Woodb. & M. 135. Brooks *v.* Bicknell, 3 McLean, 250.

[2] Wooten *v.* Smith, 27 Geo. 216. And see Lawrence *v.* Philpot, Ib. 585.

[3] Merwin *v.* Smith, 1 Green Ch. 182.

[4] Carroll *v.* Farmers etc., Harring. Mich. 197.

[5] Kinsler *v.* Clarke, 2 Hill Eq. 617.

§ 1011. The objection that the security in the injunction bond was not approved by the court, will not avail upon the final hearing, and can only be urged upon the motion to dissolve, since the only question upon the hearing is whether complainant is entitled to the relief prayed, and the question of whether the temporary injunction was properly or improperly awarded can not then be considered.[1]

§ 1012. Although legal proceedings usually abate by the death of a party to the action, yet an injunction, being in the nature of a judgment of the court, continues in force until dissolved by the court itself. And the proper practice upon the death of a complainant, after obtaining an injunction and before a hearing, is to apply to the court for a rule upon the administrator, or other representative of the deceased, to revive the action, or in default thereof that the injunction will be dissolved.[2] It follows, therefore, that upon the death of complainant before the hearing, defendant is not entitled to an immediate dissolution upon the coming in of his answer, no administration having yet been had upon complainant's estate, and he being unrepresented in the cause.[3] And in no event does the abatement of an injunction suit by the death of the complainant operate, *per se*, as a dissolution of the injunction, but an order of the court is required for that purpose.[4]

§ 1013. A similar practice prevails in case of the death of a defendant against whom an injunction has been obtained, and the court will grant a rule on complainant that the injunction shall stand dissolved, unless renewed against the representatives of the deceased within a given period.[5] The rule, however, does not apply to the case of merely formal or nomi-

[1] Boston *v.* Nichols, 47 Ill. 353.

[2] Hawley *v.* Bennett, 4 Paige, 163; Griffith *v.* Bronaugh, 1 Bland, 547; Walsh *v.* Smyth, 3 Bland, 9; Carter *v.* Washington, 1 Hen. & M. 203; Jackson *v.* Arnold, 4 Rand. 195.

[3] Hill *v.* Jones, 1 Murph. 211.

[4] Collier *v.* Bank of Newbern, 1 Dev. & Bat. Eq. 328.

[5] White *v.* Fitzhugh, 1 Hen. & M. 1. And see Hawley *v.* Bennett, 4 Paige, 163; Cummins *v.* Cummings, 4 Halst. Ch. 173.

nal parties to the proceedings, and upon their death the cause may proceed without making their representatives parties to the record.[1] And where defendant's answer is made and properly sworn to by him, but he dies before filing it, the answer may nevertheless be used on the hearing of a motion to dissolve the injunction.[2]

§ 1014. Questions concerning the continuance of motions for dissolution may be regarded as subject to the exercise of a sound legal discretion. But since courts of equity are regarded as being always open for the granting of preliminary injunctions, or to reinstate them after being improperly dissolved, an application to continue a motion for a dissolution will not be received with favor, and the continuance will only be granted upon a showing of the very gravest necessity.[3]

§ 1015. Although complainant may have waived defendant's answer under oath, yet if defendant, notwithstanding such waiver, files a sworn answer denying the equities of the bill, the injunction will be dissolved.[4] And it may be said generally, that the answer of defendant is entitled to the same credit as complainant's bill, so that the fact of the bill being sworn by several complainants, and the answer by only one of the defendants, constitutes no valid objection to the answer.[5]

§ 1016. An objection to the injunction bill on the ground of multifariousness, is held to be premature if taken on the motion to dissolve, and though such objection may be well founded, it is entitled to no weight upon the hearing of the motion.[6] A demurrer, however, for improper joinder of parties, though properly made in the first stages of the cause and before answer, may be received at any time, even upon the trial; and if the objection is one which the defendant has a right to take, but he does not see fit to exercise that right

[1] Dennis v. Green, 8 Geo. 197.
[2] Id.
[3] Radford's Ex'rs. v. Innes' Executrix, 1 Hen. & M. 8.
[4] Manchester v. Dey, 6 Paige, 295.
[5] Id.
[6] Shirley v. Long, 6 Rand. 764.

until the final hearing, the court is then bound to entertain it, and if it be valid, to dissolve the injunction.[1]

§ 1017. A defect in the verification of the bill can not be supplied upon the hearing of a motion to dissolve the injunction, since the granting of an injunction upon a bill thus defective is not merely an irregularity, but an error, to which the doctrine of waiver does not apply.[2] But if an injunction bill has been properly sworn, the fact that the officer administering the oath has neglected to sign the jurat, does not constitute sufficient ground for a dissolution.[3]

§ 1018. The English rule that exceptions to the answer, so long as undisposed of, constitute a bar to the dissolution of an injunction upon the denials contained in the answer, does not seem to prevail in the courts of this country. And where parts of the answer are responsive to the bill upon matters within defendant's knowledge, and fully deny the equity upon which the injunction rests, it is no reason for retaining the injunction that some of the exceptions to the answer are well taken.[4]

§ 1019. We have already seen that an injunction is to be implicitly obeyed until properly discharged, however irregular or erroneous the proceedings may have been in the first instance, and even though no sufficient ground existed for issuing the writ.[5] A distinction, however, is taken in the mode of procedure in obtaining the dissolution of injunctions irregularly issued, and those which are properly obtained. And while the usual practice in obtaining the dissolution of injunctions regularly issued is by a motion to dissolve, yet if the order for the injunction is irregular in the first instance, the proper practice is to move for the discharge of the order, and not for the dissolution of the injunction, since a motion to dissolve operates as a waiver of the irregularity.[6] And an

[1] Hudson *v.* Maddison, 12 Sim. 416.
[2] Perkins *v.* Collins, 2 Green Ch. 482.
[3] Capner *v.* Flemington etc., 2 Green Ch. 467.
[4] Mitchell *v.* Mitchell, 5 C. E. Green, 234.
[5] See §§ 847, 848, *ante*.
[6] Vipan *v.* Mortlock, 2 Meriv. 476; Angier *v.* May, 3 W. R. 330.

order for an injunction irregularly obtained will not be sustained upon the merits of the case as disclosed on an application to discharge for irregularity.[1] But the irregularity in obtaining the injunction may be waived by the subsequent conduct of defendant, if such conduct amounts to a recognition and affirmance of the mandate of the court.[2] Upon the overruling of a motion to dissolve, defendants, having filed their answer to the bill, can not assign the overruling of the motion as error. Such motion is regarded as in the nature of a demurrer to the bill, and the answer being in the nature of a plea, defendants by answering waive the previous demurrer, and can not afterward take advantage thereof.[3]

[1] Brooks v. Purton, 4 Beav. 494.
[2] Vipan v. Mortlock, 2 Meriv. 476. See Travers v. Stafford, 2 Ves. Sen. 20.
[3] Craig v. The People, 47 Ill. 487.

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